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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. [redacted] 49

DOROTHY BAILEY, *Petitioner*,

v.

SETH W. RICHARDSON, ET AL., *Respondents*.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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TO THE HONORABLE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Dorothy Bailey, petitioner herein, by her attorneys, prays that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia entered on March 22, 1950 which reversed in part, affirmed in part and remanded with instructions a judgment entered on August 2, 1949.

OPINIONS BELOW

The opinions of the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton (R. 114) have not yet been officially reported. The oral opinion of the District Court (R. 107-111) has not been officially reported.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1950. The jurisdiction of this Court is invoked under Title 28 U.S.C. § 1254 (formerly §§ 239 and 240 of the Judicial Code).

QUESTIONS PRESENTED

I. Whether a person may be adjudged ineligible for government service and dismissed from a non-security sensitive position, by administrative proceedings before a loyalty board, because of doubt as to her loyalty, (1) where there is no evidence against her whatever, (2) where the only evidence presented consists of a conclusive showing in her favor, and (3) where the only basis for the determination against her is secret information obtained from confidential informants whose identities are unknown to the court, the employee or the loyalty board making the decision.

The above question involves the following subsidiary questions:

a. Whether such administrative proceedings are consistent with the Constitution and in particular with the First, Fifth and Sixth Amendments.

b. Whether such administrative proceedings are consistent with the Executive Order under which they were held which provides for "maximum protection" to the government and "equal protection" to employees against "unfounded accusations of disloyalty" and which further provides that the findings must be on "all the evidence."

c. Whether an executive order purporting to authorize the determination of ineligibility for government service generally without regard to the nature of the position by administrative finding of a reasonable doubt as to loyalty is authorized by law or is valid under the Constitution.

STATUTES AND REGULATIONS INVOLVED

Executive Order 9835 (the so-called Loyalty Order), 12 F. R. 1935, March 12, 1947, is set forth in the Appendix, *infra*, at pp. 30 to 34.

STATEMENT OF THE CASE.

A. Petitioner.

Petitioner, Dorothy Bailey, has been in the government service almost continuously since November 1933. None of the positions which she held were in any sense secret or sensitive. (R. 34) She was engaged in helping Employment Services of the various States in training their personnel. Her work was based on a public document issued by the United States Employment Service and the training programs she developed were also available to the public in public libraries. (R. 34) She never had access to any secret information of any kind nor was her service in training employees connected with any security sensitive agency.

Petitioner had received Civil Service status in 1940. (R. 4, 70) In June 1947 due to a drastic reduction in force in the USES, petitioner was separated from the payroll. On March 25, 1948, she was reinstated to her old position as staff training supervisor in the USES. On May 28, 1948, she was advised that her reinstatement as a classified civil service employee was made permanent. (R. 4, 18, 19)

Petitioner's service in the United States government has been consistently good and she is recognized throughout the country as an expert in the specialized field of staff training. Her efficiency ratings were uniformly high. (R. 4, 32, 71)

B. The Loyalty Proceedings.

On the 31st day of July, 1948, some two months after her reinstatement was made permanent, petitioner received an interrogatory from the United States Civil Service Commission requesting certain information purporting to be relevant to her employment with the United States government. On August 9 petitioner, under oath, answered the interrogatories which raised questions as to her membership in and her association with various organizations. No formal charges were at any time served upon her. (R. 5, 20-25, 71, 72)

On September 13, 1948, pursuant to notice, she appeared before a Board of the Fourth Civil Service Region. The Board stated that it was inquiring whether "reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States", a standard set forth by Executive Order 9835, 12 F. R. 1935, March 21st, 1947, the so-called Loyalty Order. (R. 5, 72) At the said purported hearing no persons appeared to testify against Miss Bailey. (R. 72) She was asked questions which stated or indicated that the Civil Service Commission had information that she had been a member of or affiliated with the Communist Party. (R. 6, 74)[1] She denied these charges specifically, affirmatively and circumstantially and refuted all implications to this effect. (See Loyalty Board Hearing (L. B.) 15-19, and *passim*)[2]

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[1] There was some question about two other organizations. One of these was the American League for Peace and Democracy with which Miss Bailey had a brief and casual connection (R. 23, 24). With the other, the Washington Committee for Democratic Action, she stated she had no connection whatever (R. 24). Very little attention was paid to these allegations in the hearings and they were apparently of no concern to the Loyalty Review Board.

[2] Transcripts of the hearing and of the later hearing before the Loyalty Review Board are in the Record. These parts of the Record have not been printed but are being supplied to the Court in mimeographed form as they were to the court below. The Loyalty Board hearing will be cited as L. B., the Review Board Hearing as L. R. B., certain compiled affidavits as Aff., and a Personal History Statement as P. H.

Petitioner was examined at great length during the hearing and on a number of subjects having little or no relation to the questions appearing on the interrogatories. In addition to petitioner's specific denials that she had any relationship or sympathy with the Communist Party or any activities which are in any way connected with the Communist Party or with Communism, petitioner denied affiliation with any organization that advocated the overthrow of the government of the United States. (L. B. 14) No person appeared to testify against her. (R. 7, 75)

The allegations of membership or affiliation with the Communist Party were of most general and indefinite form. They were not detailed. They had no reference to times, places or dates and were in substance blanket generalized allegations. (L. B. 15-19) The informants against her were not identified directly or indirectly and it appeared later that even the Board members had no knowledge of who the informants were. (L. R. B. 11)

Petitioner produced in her behalf witnesses who testified affirmatively as to her loyalty. The Minister of the Metropolitan Memorial Methodist Church of Washington, D. C., appeared. (L. B. 106, 107) Various officials of the USES appeared. (L. B. 48, 107, 114). In addition, affidavits were submitted by persons who could not be present but who were prominent in business and who knew Miss Bailey. (Aff. 1, et seq.) (R. 5, 73) The record made before the Panel consisted entirely of petitioner's testimony and the testimony of others favorable to her without a single syllable of evidence to the contrary. (L. B.)

Statements were made by the Examiner of the Board and by the Board members that secret files not available to Miss Bailey contained allegations that investigating agencies of the government had received information from informants in some cases believed to be reliable, which information was contrary to her testimony and the testimony of the witnesses who appeared in her behalf. The persons who supplied this information did not supply it under oath (R. 7,

75); they were not identified to the petitioner or to the Board members. (L. R. B. 11, 72)

Nevertheless, on November 1, 1948 the Board advised Miss Bailey that " . . . it has been found that, on all the evidence, reasonable grounds exist for belief that you are disloyal to the Government of the United States.

"Your application for or eligibility from each of the examinations mentioned below has been cancelled[3] and you have been barred from civil service examinations in the Federal service for a period of three years from October 29, 1948. When the period of debarment has expired the Commission will, upon request, consider the removal of the bar." (R. 26)

Miss Bailey appealed to the Loyalty Review Board, and was heard on December 8, 1948. There, she again appeared and testified at length on her own behalf (L. R. B.) and presented an affidavit which clearly, specifically and in detail established that she could not have been guilty as alleged of membership in the Communist Party. (P. H.) Not only her own affidavit, but the affidavits of others were presented both as to her character and as to her public positions contrary to the position which any Communist could have taken. She submitted in her behalf some 60 affidavits which came from persons who knew her well. They came from 15 states and included bankers, corporation officials, federal officials, state officials, union members, former union members, etc. (Aff. See also R. 43-45) No one appeared against her. No persons purporting to have knowledge

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[3] At the foot of the letter was a list of civil service registers on which Miss Bailey's name appeared as eligible for appointment to government positions on the date of the Loyalty Board's letter and from which her name was being removed. They were as follows:

"Examinations: Training Specialist, CAF-11, 12, 13 (Central Office, Civil Service Commission).

Administrative Officer, CAF-11, 12, & 13.

"Attachment Training Specialist CAF-11, 12, 13 (Fourth Regional Office, Civil Service Commission)" (R. 27)

testified or even made a statement against Miss Bailey. (R. 9, 79)

Her affirmative case established that she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with the charge of membership in or affiliation with the Communist Party. Thus it was clearly established not only by petitioner's testimony and her own affidavit (P. H. 7-10) but by the testimony of a number of other persons that she had favored the Marshall Plan, a position notoriously opposed to that of the Communist Party. (L. B. 53, 112, 113) (See e.g., Affs. Messrs. Limbert and McCarthy.)[4] In 1940 during the period of the Nazi-Soviet Pact, she had favored Lend-Lease and was very critical of the Soviet Union's position. (L. B. 54, 55, 112, 113, Aff. McGee) In her own union she had urged that the officers sign the non-Communist affidavit. (P. H. 9, Aff. Limbert) She had opposed in her union a foreign policy resolution which was widely publicized as being pro-Russian and had suggested another resolution which was the official CIO resolution on foreign policy at the time. (P. H. 9, Aff. Limbert)

In the face of this there was only secret information in the secret files given by persons not under oath and not known even to the members of the Loyalty Board. (L. R. B. 11, 72) At the hearing before the Loyalty Review Board (part of the record herein), the Chairman of the Panel made the following statement (L. R. B. 10, 11):

> "The charge developed in these interrogatories I don't understand is confined to a union. It is that she was a member of the Communist Party in the District of Columbia as early as 1935 and that in the early days of the War period she attended Communist Party meetings, and later when she became active in the Union

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[4] These affidavits are in unnumbered pages separated to show first the affidavits submitted to the lower board, then those submitted to the Review Board. Within these categories the affidavits are included in alphabetical order.

she continued her membership—that is the communistic membership. Again about 1936 she was a known member of the so-called closed group of the Communist Party operating in the District of Columbia, and was one of those responsible for establishing a minority group in the Central Labor Council. Again that Bailey was a member of the Communist Party and has been for seven or eight years.

* * *

" . . . That Miss Bailey is either a member of the Communist Party or is completely dominated and controlled by them to the extent she follows their policy and instructions and has been doing so for a period of some eight years. That Miss Bailey is considered a member, if not an actual member one who is entirely controlled by the Communist leaders in the District of Columbia. Then that constitutes, to paraphrase as I did it, the basis for the charge against Miss Bailey."

* * *

CHAIRMAN RICHARDSON:

"I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable.

MR. PORTER:

"We would like to have their names, and I would challenge any one of them to state it publicly in a non-privileged form.

CHAIRMAN RICHARDSON:

"I want to put it up to you in the light of which the Regional Board was considering it. It wasn't on the basis of union activity; it was on the basis of a communistic activity.

MR. PORTER:

"Mr. Chairman, would we be privileged to obtain at least this much information? Those informants which are judged reliable by the Federal Bureau of Investigation, have they been active in the Federal Workers Union activity?

CHAIRMAN RICHARDSON:

"I haven't the slightest knowledge as to who they were or how active they have been in anything."

At pages 71 and 72 (L. R. B.), the Chairman, referring to the statement of confidential informants, stated:

" . . . If this testimony is true, it is neither gossip nor malicious. We are under the difficulty of not being able to disclose this.

MR. PORTER:

"Is it under oath?

CHAIRMAN RICHARDSON:

"I don't think so."

The answer admits that the identity of informants was not disclosed "nor was the information given under oath". (R. 75) Nevertheless, that Board on February 9 wrote Miss Bailey stating that the Board had reached the conclusion that the evidence in the entire record was sufficient to sustain the finding and decision of the Fourth Regional Loyalty Board and that the Federal Security Agency had been asked to dismiss the plaintiff at once. It affirmed "the decision of ineligibility by the Fourth Regional Loyalty Board." (R. 63, 65) No statement of reasons was made other than the general allegation above.

Thereafter, Miss Bailey requested review by the full Loyalty Review Board rather than by a Panel and this was denied on March 18. (R. 11, 67, 81, 82)

C. Court Proceedings.

The present action was then commenced requesting a declaration that appellant was illegally dismissed and held ineligible for government service. Reinstatement and other relief was requested. (R. 15, 16) The defendants are the Federal Security Administrator, the members of the Loyalty Board and Review Board Panels and the Civil Service Commissioners. (R. 3) By reason of a subsequent transfer of the functions of the USES to

the Department of Labor, the Secretary of Labor was added as a party. (R. 148) Cross motions for summary judgment were filed by appellant and appellees. (R. 104, 107) The District Court (per Holtzoff, J.) denied the appellant's motion for summary judgment and granted the motion of appellees for summary judgment. (R. 107-111)

The Court of Appeals by a 2-1 vote sustained the dismissal of petitioner and the finding making her ineligible for government service. It reversed only the provision of the order of the Civil Service Loyalty Board barring her from competing in civil service examinations for three years on the ground that such a bar was punishment which could not constitutionally be imposed without evidence in the legal sense as distinguished from secret "information." The Court of Appeals remanded the case for the entry of the decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136) This mandate has been stayed pending the disposition of this petition.

Judge Edgerton in a dissenting opinion (R. 136) held that the dismissal was illegal because (1) the Executive Order required that the finding of ineligibility must be "on all the evidence" and therefore could not be made upon secret information; (2) any dismissal for disloyalty and declaration of ineligibility for federal employment is a punishment requiring the safeguards of a judicial trial; and (3) the dismissal and adjudication of ineligibility in this case abridged freedom of speech and assembly.

REASONS FOR GRANTING THE WRIT.

The issues presented by this case raise questions of fundamental importance to the Government of the United States and our democratic society. The decision of the court below removes from the government service an em-

ployee in a technical position not involving the making of policy or any access to information affecting the national security. It stigmatizes her as disloyal and rates her as ineligible for any government employment without a scintilla of evidence, on the basis of secret reports of persons unknown to the Loyalty Board, to the courts, or to her. The decision makes it completely impossible for her to find the type of employment for which she is specially equipped and trained. (R. 35) The decision will make it exceedingly difficult if not impossible for her to find other employment outside the Government. This is because in applying for employment she will normally be obliged to state the reasons for her severance from Government employment, which reasons are akin to treason. Private employers might even fear that if they employed her, they themselves would be suspected by their government.

The decision constitutes a continuing threat to thousands of loyal Government employees that they, too, may find their careers ruined by informants whose identity and charges will never be known to them. As Judge Edgerton stated: "However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him." (R. 138)

1. We respectfully urge this Court to take note of the fact that the action of the Loyalty Board not only directs the dismissal of the petitioner from her present position but declares her to be ineligible for employment in the Federal Government. It is impossible in light of the record to regard this case as a mere dismissal by the Government because of the unsuitability of the petitioner for the particular position she held. The Loyalty Board was not considering the suitability of the petitioner for any particular position. As we have pointed out, her work did not involve

the making of policy nor did it give her access to any information affecting the security or safety of the nation. The Loyalty Board did not question her competence or ability to perform her job, nor did it consider any possible danger or disadvantage to the Government in her continuing in that job. Rather, the Loyalty Board, disregarding her record of long and faithful service to her government, was determining whether the unevaluated and uncorroborated files of the secret police disclosed any reasonable ground for doubting her loyalty to the United States. In so finding they determined that she was ineligible to hold any position however lowly or non-sensitive in the United States Government. This was done without disclosing to her the information on which they acted and without giving her the right to confront and cross-examine those who privately denounced her.

By striking out the provision barring the petitioner from competing in civil service examinations for three years the court below did not change the character of the order which clearly and explicitly found her ineligible for employment in the Government service and provided her no means, now or in the future, for removing from her record that stigma of ineligibility on grounds of disloyalty.

The action of the Loyalty Board is therefore in effect an adjudication which stigmatizes and punishes the petitioner no less than would a conviction for an infamous crime. Such action is in direct conflict with the principles enunciated by this Court in the *Lovett* case. *United States* v. *Lovett*, 328 U. S. 303.

This adjudication was made without any of the safeguards of due process. It is justified by the court below only on account of the public interest in combating communism even to the extent of using methods which violate the spirit and letter of the Bill of Rights.

Whether there is such a condition of peril and insecurity within the Government of the United States as to justify the sweeping suspension of our traditional methods of fair

trial for employees whose work does not affect the security of the United States is a question of such overwhelming public significance as to require the Court to grant certiorari in this case.

2. We also respectfully direct the Court's attention to the fact that the decision of the court below construes words in the Presidential Loyalty Order which were designed for the protection of Government employees as a weapon to deprive such employees of any protection against unfounded charges of disloyalty. The preamble of the order reads as follows:

> "*Whereas maximum protection must be afforded the United States* against infiltration of disloyal persons into the ranks of its employees, *and equal protection from unfounded accusations of disloyalty* must be afforded the loyal employees of the Government." [Emphasis supplied.]

Carrying out the intent of the preamble, the order itself purported to provide at least a fair administrative hearing. In Part V, under the heading "Standards," the order reads:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, *on all the evidence*, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." [Emphasis supplied.]

In interpreting the meaning of the words "maximum protection" of the Government, "equal protection" to the employee, and the words "all the evidence", the court below said that a finding of disloyalty could be sustained if the only so-called "evidence" to support it was secret information not under oath supplied to the Department of Justice by informants unknown even to the Loyalty Board. It is obvious that the Loyalty Board itself was not in a position to weigh the reliability of information given by

informants unknown to it. Neither the secret police nor their informants appeared before the Loyalty Board. The Board accepted without question the unexplained opinion contained in the FBI report that these informants were reliable and thereby delegated its quasi-judicial function to the secret police.

In approving this procedure the court below has sanctioned the identical process by which Dreyfus was convicted in 1894. It will be recalled that the French tribunal acted on a sealed envelope handed it by the French Ministry of Justice and that in 1899 the French Court of Cassation repudiated that procedure and re-opened the case. *The Dreyfus Case* by Alfred Dreyfus and Pierre Dreyfus, Yale University Press, 1937.

But there is a precedent even more pertinent than the Dreyfus case. The decision of the court below is in direct conflict with the decision of another presidential tribunal which gave prison sentences to German judges who used the same kind of evidence to convict German nationals. We quote the relevant portions of the opinion of the presidential tribunal sitting at Nuremberg.

> "The final degradation of the judiciary is disclosed in a secret communication by Ministerial Director Letz of the Reich Ministry of Justice to Dr. Vollmer, also a Ministerial Director in the Department. Not only were the judges 'guided' and at times coerced; they were spied upon. We quote:
>
> > 'Moreover, I know from documents, which the Minister produces from time to time out of his private files, that the Security Service takes up special problems of the administration of justice with thoroughness and makes summarized situation reports about them. As far as I am informed, a member of the Security Service is attached to each judicial authority. This member is obliged to give information under the seal of secrecy. This procedure is secret and the person who gives the information is not named. In this way we get, so to say, anonymous reports. Reason given for this procedure are of State political

> interest. As long as the direct interests of the State security are concerned, nothing can be said against it, especially in wartime.'
>
> "In view of the conclusive proof of the sinister influences which were in constant interplay between Hitler, his Ministers, the Ministry of Justice, the Party, the Gestapo, and the courts, we see no merit in the suggestion that Nazi judges are entitled to the benefit of the Anglo-American doctrine of judicial immunity." *United States* v. *Joseph Alstoetter.*[5]

We can see no distinction between this case and the Nuremberg case excepting that the German judges had imposed penalties involving death and imprisonment on secret information. The penalty imposed by the Board here involves the indelible stigma of disloyalty and the loss of livelihood and the respect of one's fellow citizens. But we suggest that such a distinction has no validity as a basis for construing what the President meant by the phrases "maximum protection" of the Government and "equal protection" to the employee against "unfounded accusations of disloyalty" and by the requirement that the findings with respect to disloyalty must be "on all the evidence".

This conflict in principle between the President's tribunal at Nurenberg and the President's Loyalty Board sitting in Washington presents an issue of such public importance that it should be resolved by this Court.

3. The construction given the order of the court below is not only inconsistent with the principles of fair procedure which the United States announced to the world at Nuremberg, it also makes a mockery of the President's declaration in his Executive Order assuring Government employees "protection" against "unfounded accusations of disloyalty". The President set up a procedure of hearings on appeal which, on their face, purported to provide at least a fair administrative hearing. The court below interprets

[5] The record is available at the Library of Congress.

them to mean that the employee has no protection whatever and that even the reviewing courts cannot question the certificate of a police agency as to what weight they should give the secret information. The so-called "hearings" and "appeals" mean under the construction of the court below only that the employee may talk without knowing the information against him and without being given any real guide or clue as to how he may meet it. The court below is saying that when the President said that the employee was to retain the equal of "maximum protection" he did not mean maximum protection; that when he said "evidence" he did not mean evidence; that when he said "hearing" he did not mean hearing in the traditional American sense.

This construction of the presidential order in our view impairs the good faith and integrity of the President's announced purpose in adopting the order. It presents to this Court a question of paramount public importance,—the question whether or not the President's promise of fair treatment to employees should be honored by the Court in interpreting his order.

CONCLUSION.

This case in no sense involves the right of the Federal Government to refuse employment to a person in an important policy or security sensitive position because in the opinion of the appointing authority such person does not possess the outstanding qualities of reliability and public confidence which should be required of one in such a position. This case involves only the question of the right of the Government to determine that a person is ineligible for *any* employment in the Government regardless of its relation to the security or safety of the nation by an administrative procedure which does not disclose the information on which the Government acts and provides no opportunity of cross-examination. To meet Congressional requirements government employees are required to take an oath that

they do not advocate or belong to any organization which advocates the overthrow of the government. For false swearing a government employee may be indicted and punished in accordance with the traditional judicial process (*Marzani* v. *United States*, 168 F. 2d 133 (App. D. C., 1948), aff'd 335 U. S. 895; 336 U. S. 922). The national security does not require or justify the use of star chamber methods to enforce these requirements, certainly not in relation to government employment which involves no clear or present danger to the national security.

These are the reasons of paramount public importance which in our view require the granting of certiorari.

Respectfully submitted,

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BRIEF IN SUPPORT OF PETITION.

We rely on the able and exhaustive opinion of Mr. Justice Edgerton, dissenting, as our brief in support of petition for writ of certiorari.

EDGERTON, Circuit Judge, *dissenting:* Without trial by jury, without evidence, and without even being allowed to confront her accusers or to know their identity, a citizen of the United States has been found disloyal to the government of the United States.[1]

For her supposed disloyal thoughts she has been punished by dismissal from a wholly nonsensitive position in which her efficiency rating was high. The case received nation-wide publicity. Ostracism inevitably followed. A finding of disloyalty is closely akin to a finding of treason. The public hardly distinguishes between the two.

No charges were served on appellant. The chairman of the Regional Board said "Nobody has presented any charges." The Board told appellant it was inquiring whether there were reasonable grounds for believing she was disloyal to the government of the United States. The Federal Bureau of Investigation had reported that informants believed to be reliable had made general statements purporting to connect her with the Communist Party. These reports were not disclosed to the appellant and have not been disclosed in court. The informants were not identified to the appellant or even to the Board. Their statements were admittedly not made under oath. The appellant denied under oath any membership in and any relationship or sympathy with the Communist Party, any activities connected with it or with communism, and any affiliation with any organization that advocated overthrow of the government of the United States. She asserted her loyalty to the government of the United States. She admitted attending one Communist meeting in 1932 in connection with a seminar study of the platforms of the various parties while she was a student at Bryn Mawr.

Appellant had no power to subpoena witnesses. Though it takes courage to appear as a voluntary defense witness in a loyalty case, four appeared. One was the pastor of the Methodist church of which appellant is an active member. He testified: "When this charge or information came to me I was not only surprised, I was dumfounded. . . . People in our community and in our church think of her and her family in the highest terms." Three officials of appellant's government agency, the United States Employment Service, who had

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[1] The form of the finding against the appellant is that "reasonable grounds exist for belief" that she is disloyal to the government of the United States. The only important difference between this finding and a direct adjudication of disloyalty is that the former finding is easier to make. Once made, there is no practical difference. Executive Order 9835 recognizes this. In Part I, 2a it describes the form of finding prescribed in the Order and made here as an "adjudication of disloyalty"; in Part V, 2 as a "determination of disloyalty".

known appellant professionally and socially for years, testified respectively that they were "extremely shocked" by the suggestion of her being disloyal, that it was "inconceivable" and "out of reason". Persons prominent in business, government and education who knew appellant but could not be present submitted affidavits.

No witness offered evidence, even hearsay evidence, against appellant. No affidavits were introduced against her. The record consists entirely of evidence in her favor. Yet the Board purported to find "on all the evidence" that there were reasonable grounds for believing she was disloyal to the government of the United States. Appellees admit the Board made this finding "after considering all the evidence, including the confidential reports of the Federal Bureau of Investigation." The Board directed the Federal Security Agency to suspend appellant pending her appeal to the Loyalty Review Board, and told her she was barred from civil service examinations for three years.

Appellant appeared and testified before a panel of the Loyalty Review Board. She submitted her own affidavit and the affidavits of some 70 persons who knew her, including bankers, corporate officials, federal and state officials, union members, and others. Again no one testified against her. She proved she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with Communist sympathies. She showed not only by her own testimony but by that of other persons that she favored the Marshall Plan, which the Communist Party notoriously opposed, and that in 1940, during the Nazi-Soviet Pact, she favored Lend-Lease and was very critical of the Soviet position. In her union she urged its officers to execute non-communist affidavits, opposed a foreign policy resolution widely publicized as pro-Russian, and favored what was then the official CIO resolution on foreign policy.

Against all this, there were only the unsworn reports in the secret files to the effect that unsworn statements of a general sort, purporting to connect appellant with Communism, had been made by unnamed persons. Some if not all of these statements did not purport to be based on knowledge, but only on belief. Appellant sought to learn the names of the informants or, if their names were confidential, then at least whether they had been active in appellant's union, in which there were factional quarrels. The Board did not furnish or even have this information. Chairman Richardson said: "I haven't the slightest knowledge as to who they were or how active they have been in anything." All that the Board knew or we know about the informants is that unidentified members of the Federal Bureau of Investigation, who did not appear before the Board, believed them to be reliable. To quote again from the record: "CHAIRMAN RICHARDSON: I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable." "MR. SEASONGOOD: Here is a statement that it was ascertained you were a member of the Communist Party in the District of Columbia as early as 1935, and that in the early days of her Party membership

she attended Communist Party meetings. . . . Here is another that says you were a member of the Communist Party, and he bases his statement on his knowledge of your association with known Communists for the past seven or eight years. That is part of the evidence that was submitted to us." "MR. PORTER: Is it under oath? CHAIRMAN RICHARDSON: I don't think so. MR. SEASONGOOD: It is a person of known responsibility who had proffered information concerning Communist activity in the District of Columbia. . . . Here is another one: 'considers appointee a member of the Communist Party, and if not an actual member, one who is entirely controlled by the wishes of the Communist Leaders in the District of Columbia.'"

On such material, the Review Board sustained the action of the Regional Board and directed the Federal Security Agency to dismiss the appellant. However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him.

Appellant's dismissal violates both the Constitution and the Executive Order.[2]

I. *Executive Order 9835*[3] *requires evidence and an opportunity for cross-examination.* The Executive Order provides that "The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[4] Despite the plain words "all the evidence", the court rules that the Order requires no evidence and authorizes findings based on unsworn confidential reports of unsworn statements of anonymous informants as to their beliefs concerning an employee's affiliations. I think the Order does no such thing.

The court derives its paradoxical conclusion from premises that do not support it. The court points out that the Order and a supplementary order require the names of confidential informants, and reports of the proceedings, to be kept confidential. But no order requires the Board to consider only confidential information. To say that confidential informants shall not be disclosed is not to say that willing government witnesses shall not be heard or that findings may be made without evidence. Neither is the prohibition

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[2] The Boards that dismissed the appellant are agencies of the Civil Service Commission. Before their proceedings took place, the appellant had been reinstated in her permanent position in the classified civil service from which she had previously been separated by a reduction in force. Therefore both the Lloyd-LaFollette Act, 37 Stat. 555, § 6, 5 U. S. C. § 652, and the Executive Order, Part I, 1 and Part II, preclude the Civil Service Commission, or any administrative agency other than the one in which she worked, from interfering with her tenure.

[3] 12 FED. REG. 1935.

[4] Part V, 1.

against publication of reports a prohibition against hearing witnesses. On the contrary, Executive Order 9835 expressly authorizes testimony by witnesses for the accused employee.[5] If anything so unprecedented as a prohibition of testimony by witnesses for the government had been intended it would have been plainly expressed. Unsworn anonymous statements may be used and useful as leads to evidence but not as substitutes for evidence.

The requirement of the Order that findings be based on evidence is not merely uncontradicted by the context. It is confirmed by the context. The preamble of the Order says that both the United States and the accused employee must be afforded "maximum protection."[6] Such protection plainly includes an opportunity to introduce witnesses and to cross-examine opposing witnesses. Even the minimum standards of fairness that are known as due process of law include as much. Hardly any protection at all is possible against vague assertions of unseen and unknown persons. The accused employee can only deny such assertions and prove, as the appellant did, that they are inconsistent with her reputation and with some of her acts. She can prove no specific contradictions, no mistaken identities, and no alibis, for she cannot discover just when and where she is supposed to have done or said anything. However prejudiced, mistaken, untruthful, delinquent, or defective her accusers might prove to be if they could be cross-examined, an unidentified agent's recorded belief in the reliability of their reports and inferences must go unchallenged. "The many possible deficiencies, suppressions, sources of error and untrustworthiness, which lie underneath the bare untested assertion of a witness, may be best brought to light and exposed by the test of Cross-examination. . . . It is beyond any doubt the greatest legal engine ever invented for the discovery of truth."[7]

Moreover the Order provides that "an officer or employee who is charged with being disloyal shall have a right to an administrative hearing . . ."[8] Particularly in the light of the guarantee of maximum protection, this must mean a full administrative hearing. Even a normal administrative hearing, to say nothing of one that affords maximum protection, includes the right of confrontation and cross-examination and the requirement that findings be based on evidence. Evidence has been required in administrative hearings even where, as here, the substantive matter at stake may be considered a privilege rather than a right. Aliens are entitled to a fair hearing in deportation proceedings, and this despite the fact that "there is no express requirement for any hearing or adjudication in the statute

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[5] Part II, 2a.

[6] "Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:"

[7] WIGMORE, EVIDENCE, §§ 1362, 1367, (3d ed. 1940).

[8] Part II, 2a.

authorizing deportation." [9] Even in deportation proceedings against aliens charged with advocating, or with membership in organizations advocating, overthrow of the government by force, evidence is required. The Supreme Court has said in such cases: "If the hearing was fair, if there was evidence to support the finding of the Secretary, and if no error of law was committed, the ruling of the Department must stand and cannot be corrected in judicial proceedings. If, on the other hand, one of the elements mentioned is lacking, the proceeding is void and must be set aside." [10] "The ultimate question presented by this record . . . is whether the warrant of deportation was supported by any evidence that the alien when he entered the United States advocated opposition to all organized government or the overthrow of the United States government by force and violence . . ." [11] "Though deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. . . . Meticulous care must be exercised lest the procedure by which he is deprived of that liberty not meet the essential standards of fairness." [12] It follows that even if the Executive Order did not expressly require findings based on evidence, or promise maximum protection, the administrative hearing which the Order guarantees to the employee whose job and reputation are at stake would still require evidence and an opportunity for cross-examination. As the Supreme Court has said, "manifestly there is no hearing when the party does not know what evidence is offered or considered and is not given an opportunity to test, explain, or refute." [13]

No doubt cases arise in which investigation of an employee produces only anonymous accusations. The Executive Order elects to preserve their anonymity. No one questions the validity of that election. But its effect is that the employee must be cleared or the proceedings dropped.[14] The Executive Order does not, and could not constitutionally, provide that he may be found disloyal without evidence.

II. *Dismissal for disloyalty is punishment and requires all the safeguards of a judicial trial.* Most dismissals, including among others dismissals for colorless or undisclosed reasons and dismissals for incompetence, are plainly not punitive. They do not require a judicial trial or even a full administrative hearing. They are within the authority of the executive. Likewise most tax laws are within the authority

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[9] *Wong Yang Sung* v. *Clark*, U. S. , decided Feb. 20, 1950; 18 L. W. 4166, 4171.

[10] *Kessler* v. *Strecker*, 307 U. S. 22, 34.

[11] *Vajtauer* v. *Comm'r of Immigration*, 273 U. S. 103, 106.

[12] *Bridges* v. *Wixon*, 326 U. S. 135, 154.

[13] *Interstate Commerce Commission* v. *Louisville & Nashville Railroad*, 227 U. S. 88, 93. The Massachusetts Supreme Court has quoted this statement in reviewing the dismissal of a school principal by a board of education. *Moran* v. *School Committee of Littleton*, 317 Mass. 591, 594-595, 59 N. E. 2d 279, 281.

[14] *Cf. United States* v. *Grayson*, 166 F. 2d 863, 870.

of the legislature. It does not follow that all legislative taxation is constitutional or that all executive dismissals are constitutional.

Punishment is infliction of harm, usually for wrong conduct but in appellant's case for wrong views. Dismissals to provide jobs for persons of certain affiliations, whatever else may be said of such dismissals, are not punitive. But dismissals for disloyal views are punitive. This is what the Supreme Court squarely held in the *Lovett* case.[15] It overruled no cases in so holding. The earlier decisions of the Supreme Court on which this court relies are irrelevant because they involved dismissals for undisclosed reasons, not for disloyal views.

The question whether the rule of the *Lovett* case extends to dismissals of "disloyal" persons from sensitive positions in which their presence might threaten substantial harm to the government does not arise in the present case and I express no opinion on it. Appellant was dismissed from a nonsensitive position. She was a staff training officer in the United States Employment Service. In the case of such an officer, no way is apparent and none has been suggested in which "suspicion of disloyalty indicates a risk" to the security of the United States. ***Appellant's dismissal for wrong views has nothing to do with protecting the security of the United States.***

Congress attempted to dismiss Lovett and two others from their government positions as of November 15, 1943, because of their supposed disloyal views. Their agencies kept them at work on their jobs for varying periods after November 15 but discontinued their salaries after that date. They sued for and recovered salaries for their post-November 15 work. The Supreme Court held that their dismissals for supposed disloyalty, "which stigmatized their reputation and seriously impaired their chance to earn a living,"[16] were equivalent to punishment for crime and therefore could not be imposed by Congress or without judicial trial. The validity of an incidental attempt of Congress to make them ineligible for possible future appointments was not the question before the Court. They did not ask for, and it does not even appear that they would have been willing to accept, either reinstatement in their old positions or appointments to new positions. The Court *said* "This permanent proscription from any opportunity to serve the government is punishment . . ."[17] But the question before the Court was whether the attempted dismissals were valid. This was the question the Court *decided*.

This court is deciding this case as if the Supreme Court had sustained the attempt of Congress to dismiss Lovett and the others, denied their claims to salaries, and awarded them nothing but an assurance that they would be eligible for possible future appointments if they were ever offered any that they cared to accept. This

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[15] *United States* v. *Lovett*, 328 U. S. 303.

[16] 328 U. S. at 314.

[17] 328 U. S. at 316.

court interprets the *words* of the Supreme Court regarding "permanent proscription" as contradicting and overruling the *decision* of the Supreme Court regarding dismissals. If the Court's words had been inconsistent with its decision our duty would of course have been to follow the decision, not the words. But they were not inconsistent. The dismissals that the Court held invalid were the immediate phase of the permanent proscription that the Court said was invalid.

The distinction this court draws between dismissal as punishment and ineligibility as punishment not only contradicts the *Lovett* case but has no basis in reason. Dismissal is more certainly damaging than ineligibility, for the necessary combination of vacancies, qualifications, and desire for public appointment may never occur again. A person dismissed as disloyal can obtain no normal employment, public or private. The President's Committee on Civil Rights said in 1947: "It is a severe punishment to be discharged from the government for disloyalty, as the Supreme Court pointed out in 1946 in *United States* v. *Lovett*. . . . Loss of job and inability to obtain another one is a severe punishment to impose on any man." [18] It makes no present or probable future difference to the appellant and it should make no difference to a court whether the appellant is told that she is separated from the civil service for life, for three years, or only for the moment. Whatever she is told, if her dismissal is sustained she will not be reemployed while the present climate of opinion continues.

Since dismissal from government service for disloyalty is punishment, due process of law requires that the accused employee be given all the safeguards of a judicial trial before it is imposed. The Supreme Court in the *Lovett* case did not stop with holding that *Congress* could not dismiss employees for disloyalty. It went on to say, with particular reference to this punishment: "Those who wrote our Constitution . . . intended to safeguard the people of this country from punishment without trial by duly constituted courts. . . . And even the courts to which this important function was entrusted were commanded to stay their hands until and unless certain tested safeguards were observed. An accused in court must be tried by an impartial jury, . . . he must be clearly informed of the charge against him, the law which he is charged with violating must have been passed before he committed the act charged, he must be confronted by the witnesses against him . . . and even after conviction no cruel and unusual punishment can be inflicted upon him." [19]

Not only the basic right to judicial trial but every one of these basic safeguards, unless it be the last, was violated here.[20] (1) The appellant was not tried by a jury. (2) She was not clearly informed of the charge against her. This is true not only because there was

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[18] *To Secure These Rights*, p. 51.

[19] 328 U. S. at 317-318.

[20] The Supreme Court named additional safeguards, including the right to counsel, which I have omitted from the quotation because they were not violated here.

no formal charge and, according to the Chairman of the Regional Board, no charge at all, but also because of the vagueness of the term "disloyal". It is so indefinite that neither the Executive Order nor, as far as appears, the Loyalty Review Board has attempted to define it. It means different and sometimes opposite things to different people. Since section 9A of the Hatch Act[21] forbids employment of members of an organization that advocates (and, by necessary implication, of persons who advocate) "the overthrow of our constitutional form of government in the United States," the Executive Order is plainly meant to cover more ground, but how much more no one can say. As the Supreme Court has repeatedly held, very indefinite standards cannot be used as a basis for punishment. (3) The appellant violated no law. (4) Even the Executive Order was issued after the activities from which her disloyalty is inferred took place, if they took place at all. (5) She was not confronted with any witnesses against her. (6) Forced idleness may well be considered a cruel as well as unusual punishment. It has been considered more severe than forced labor.

Because certain officials should be free from apprehension that personal harm to them may result from their official acts they cannot, as the court points out, be required to pay damages for their official errors. But that is irrelevant here. The present appellant asks compliance with the Constitution, not damages for its violation. "Under our constitutional system, certain rights are protected against governmental action and, if such rights are infringed by the actions of officers of the Government, . . . the courts have the power to grant relief against those actions."[22]

III. *Appellant's dismissal abridges freedom of speech and assembly.*[23] Mr. Justice Holmes' famous statement, made in 1892 when he was a member of the Supreme Judicial Court of Massachusetts, that "the petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman"[24] is greatly oversimplified. "As pointed out in Frost Trucking Co. v. Railroad Comm., 271 U. S. 583, 594, 46 S. Ct. 605, 607, 70 L. Ed. 1101, even in the granting of a privilege, the state 'may not impose conditions which require the relinquishment of constitutional rights . . .'"[25] including the rights of free speech, press, and assembly. In the *Esquire*

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[21] 53 Stat. 1148, 5 U. S. C. 118j.

[22] *Larson* v. *Domestic & Foreign Corp.*, 337 U. S. 682, 704.

[23] Read literally, the First Amendment forbids only *Congress* to abridge these freedoms, but as the due process clause of the Fourteenth Amendment extends the prohibition to all state action the due process clause of the Fifth must extend it to all federal action. *Cf. United Public Workers* v. *Mitchell*, 330 U. S. 75, 94-95.

[24] *McAuliffe* v. *Mayor of New Bedford*, 155 Mass. 216, 220, 29 N. E. 517.

[25] *Alston* v. *School Board of City of Norfolk*, 112 F. 2d 992, 997 (C. A. 4th). The court also cited *Union Pac. R. Co.* v. *Public Service Comm.*, 248 U. S. 67, 69, 70, and *Hanover Ins. Co.* v. *Harding*, 272 U. S. 494, 507. *Cf. Western Union Telg. Co.* v. *Kansas*, 216 U S. 1; *Terral* v. *Burke Construction Co.*, 257 U. S. 529.

case the Supreme Court said: "We may assume that Congress . . . need not open second-class mail to publications of all types. . . . But grave constitutional questions are immediately raised once it is said that the use of the mails is a privilege which may be extended or withheld on any grounds whatsoever. See the dissents of Mr. Justice Brandeis and Mr. Justice Holmes in *Milwaukee Publishing Co.* v. *Burleson*, 255 U. S. 407, 421-423, 430-432, 437-438. Under that view the second-class rate could be granted on condition that certain economic or political ideas not be disseminated." [26] Similarly, the premise that government employment is a privilege does not support the conclusion that it may be granted on condition that certain economic or political ideas not be entertained. Though members of minority parties have often been dismissed, in the past, to make room for members of a party in power, any comprehensive practice of that sort would today be unthinkable as well as illegal, and the Supreme Court has plainly indicated it would also be unconstitutional. The Court pointed out in the *Mitchell* case that Congress could not " 'enact a regulation providing that no Republican, Jew or Negro shall be appointed to federal office, or that no federal employee shall attend Mass or take any active part in missionary work.' " [27]

The dismissal which the Court upheld in the *Mitchell* case was not based on views but on conduct. The Hatch Act sought to restrain civil servants, regardless of their views, from devoting more than a limited amount of energy to politics. The Court held that "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service." [28] Since the present appellant was not a policy-making officer, had no access to state secrets, and was not even in a sensitive agency, it is doubtful whether any political opinions of hers, however obnoxious, could reasonably be deemed to interfere with the efficiency of the service. But the question is, I think, immaterial here, for the "vague and indeterminate . . . boundaries" [29] of the term "disloyal" have made the Executive Order as construed and applied a restraint on many opinions that certainly cannot be deemed to interfere with the efficiency of the service.

"In loyalty hearings the following questions have been asked of employees against whom charges have been brought. . . . 'Do you read a good many books?' 'What books do you read?' 'What magazines do you read?' 'What newspapers do you buy or subscribe to?' 'Do you think that Russian Communism is likely to succeed?' 'How do you explain the fact that you have an album of Paul Robeson records in your home?' 'Do you ever entertain Negroes in your home?' . . . 'Is it not true . . . that you lived next door to and

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[26] *Hannegan* v. *Esquire, Inc.*, 327 U. S. 146, 155, 156.

[27] *United Public Workers* v. *Mitchell*, 330 U. S. 75, 100.

[28] *Id.* at 101.

[29] *Herndon* v. *Lowry*, 301 U. S. 242, 264.

therefore were closely associated with a member of the I. W. W.?'"[30] "Too often the line of questioning has revolved around conformity with prevailing mores in personal habits and personal opinion. . . . A woman employee was accused of disloyalty because, at the time of siege of Stalingrad, she collected money for Russian war relief (she also collected money for British and French relief)."[31] A record filed in this court shows that an accused employee was taken to task for membership in Consumers Union and for favoring legislation against racial discrimination. The record in the present case contains the following colloquy between a member of the Regional Board and the present appellant: "MR. BLAIR: Did you ever write a letter to the Red Cross about the segregation of blood? MISS BAILEY: I do not recall. MR. BLAIR: What was your personal position about that? MISS BAILEY: Well, the medical—. MR. BLAIR: I am asking yours."[32]

No doubt some boards are quite aware that unconventional views and conduct have no tendency to indicate disloyalty. But the fact remains that some boards imagine the contrary. This fact is only too well known. It puts government employees under economic and social pressure to protect their jobs and reputations by expressing in words and conduct only the most orthodox opinions on political, economic, and social questions.

A regulation that restrains constitutionally protected speech along with other speech cannot be enforced against either. Legislation is unconstitutional as a whole if it "does not aim specifically at evils within the allowable area of state control but . . . sweeps within its ambit other activities that in ordinary circumstances constitute an exercise of freedom of speech or of the press. The existence of such a statute . . . results in a continuous and pervasive restraint on all freedom of discussion that might reasonably be regarded as within its purview. . . . An accused . . . under such a statute, does not have to sustain the burden of demonstrating that the State could not constitutionally have written a different and specific statute covering his activities as disclosed by the charge and the evidence introduced against him. . . . Where regulations of the liberty of free discussion are concerned, there are special reasons for observing the rule that it is the statute, and not the accusation or the evidence under it, which prescribes the limits of permissible conduct and warns against transgression."[33]

The Supreme Court has foreseen practically the case now before us. In holding a New York statute unconstitutional the Court said: "The present case as to a vague statute abridging free speech involves the circulation of only vulgar magazines. The next may call for decision

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[30] *Freedom vs. Security*, by Robert E. Cushman, Goldwin Smith Professor of Government in Cornell University; in PHYSICS TODAY, March 1949, pp. 14, 18.

[31] Editorial in The Washington Post, Feb. 6, 1949.

[32] Miss Bailey replied "I have no personal opinion."

[33] *Thornhill* v. *Alabama*, 310 U. S. 88, 97-98.

as to free expression of political views in the light of a statute intended to punish subversive activities."[34]

Freedoms that may not be abridged by law may not be abridged by executive order. Executive power to control public employment stands on no higher constitutional ground than legislative power to tax. The taxing power does not extend to sales of propaganda not made for profit; license taxes, though imposed for the legitimate purpose of raising revenue, are unconstitutional in their application to such sales.[35] Such taxes, even if they are too small to be a "substantial clog"[36] on the circulation of propaganda, are "on their face . . . a restriction of the free exercise of those freedoms which are protected by the First Amendment."[37] The loss of employment, reputation, and earning power here involved is on its face a very substantial clog on the free exercise of those protected freedoms. It is therefore more clearly unconstitutional than the taxes.

Appellant's dismissal abridges not only freedom of speech but freedom of thought. Whatever loyalty means in the present connection, it is not speech but a state of mind. The appellant was dismissed for thinking prohibited thoughts. A constitution that forbids speech control does not permit thought control.

Appellant's dismissal attributes guilt by association, and thereby denies both the freedom of assembly guaranteed by the First Amendment and the due process of law guaranteed by the Fifth. The appellant was dismissed as disloyal because she was believed to be a member or associate of the Communist Party. Undoubtedly many such persons are disloyal in every sense to the government of the United States. But the Supreme Court has held that a particular member of the Communist Party may be "attached to the principles of the Constitution" within the meaning of those words in a naturalization act: "As Justice Holmes said, 'Surely it cannot show lack of attachment to the principles of the Constitution that . . . [one] thinks it can be improved. . . . If there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought—not free thought for those who agree with us, but freedom for the thought that we hate.'. . . Under our traditions beliefs are personal and not a matter of mere association, and . . . men in adhering to a political party or other organization notoriously do not subscribe unqualifiedly to all of its platforms or asserted principles."[38] As was said more recently, "To condemn or to interdict all members of a named political party is an abridgement of free

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[34] *Winters* v. *New York*, 333 U. S. 507, 518.

[35] *Jones* v. *City of Opelika*, 319 U. S. 103; *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105; *Busey* v. *District of Columbia*, 319 U. S. 579; *Busey* v. *District of Columbia*, 78 U. S. App. D. C. 189, 138 F. 2d 592.

[36] *Jones* v. *City of Opelika*, 316 U. S. 584, 604. The dissent of Chief Justice Stone and the other dissents filed at the same time were afterwards adopted as opinions of the Court. *Jones* v. *City of Opelika*, 319 U. S. 103, 104.

[37] *Murdock* v. *Commonwealth of Pennsylvania*, 319 U. S. 105, 114.

[38] *Schneiderman* v. *United States*, 320 U. S. 118, 138, 136.

speech, press and assembly. The Communist Party in this country is recognized as a political party." [39]

The court thinks Miss Bailey's interest and the public interest conflict. I think they coincide. Since Miss Bailey's dismissal from a nonsensitive job has nothing to do with protecting the security of the United States, the government's right to preserve itself in the world as it is has nothing to do with this case. The ominous theory that the right of fair trial ends where defense of security begins is irrelevant.

On this record we have no sufficient reason to doubt Miss Bailey's patriotism, or that her ability and experience were valuable to the government. We have no reason to suppose that an unpatriotic person in her job could do substantial harm of any kind. Whatever her actual thoughts may have been, to oust her as disloyal without trial is to pay too much for protection against any harm that could possibly be done in such a job. The cost is too great in morale and efficiency of government workers, in appeal of government employment to independent and inquiring minds, and in public confidence in democracy. But even if such dismissals strengthened the government instead of weakening it, they would still cost too much in constitutional rights. We cannot preserve our liberties by sacrificing them.

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[39] Prettyman, Circuit Judge, dissenting, in *National Maritime Union of America* v. *Herzog*, 78 F. Supp. 146, 177, 178. The Supreme Court affirmed the decision of the court on other grounds, saying: "We do not find it necessary to reach or consider the validity of § 9(h)" of the National Labor Relations Act as amended, which requires non-Communist affidavits. *National Maritime Union of America* v. *Herzog*, 334 U. S. 854-855.

APPENDIX.

EXECUTIVE ORDER NO. 9835, 12 F. R. 1935.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I

INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon ac-

tual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.

b. Civil Service Commission files.

c. Military and naval intelligence files.

d. The files of any other appropriate government investigative or intelligence agency.

e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person

or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

Part III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not

be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI

MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE.
MARCH 21, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1949

No. 766

DOROTHY BAILEY, PETITIONER

v.

SETH W. RICHARDSON, ET AL.[1]

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 107) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 114) is not yet reported.

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[1] Respondents are the Administrator of the Federal Security Agency, the Secretary of Labor, members of the Civil Service Commission, members of a panel of its Loyalty Review Board, and members of a panel of its Fourth Regional Loyalty Board.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1950 (R. 147). The petition for a writ of certiorari was filed on April 19, 1950. The jurisdiction of this Court is invoked under 28 U.S.C. 1254.

QUESTION PRESENTED

Although the petition (pp. 2-3) seeks to raise several questions, we believe that the following question is dispositive of the case:

Whether a person conditionally reinstated subject to investigation by the Civil Service Commission as to her qualifications for Government employment, who is not in the classified Civil Service during the period of such investigation, is entitled to judicial relief after the Commission has determined that she is not qualified for employment because of reasonable doubt as to her loyalty to the United States.

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12 F. R. 1935, is set out in full at pp. 30-36 of the appendix to the petition for certiorari.

STATEMENT

Petitioner was employed in the classified Civil Service of the United States from August 19, 1939, to June 28, 1947 (R. 4, 17, 70),[2] when, due to a re-

[2] Petitioner was given a classified status on May 28, 1940, effective as of August 19, 1939 (R. 4, 17, 70).

duction in force, she was separated from the service (R. 4, 70, 92). On March 25, 1948, she was given a temporary appointment, and on May 28, 1948, she was reinstated (R. 4, 18-19, 71), but only conditionally.

The regulations of the Civil Service Commission issued under Executive Order 9830, 3 C.F.R. 108 (1947 Supp.), and in effect at the time of petitioner's reinstatement, made her reinstatement subject to the condition that removal might be ordered by the Commission if an investigation made within eighteen months disclosed disqualification for Federal employment. 5 C.F.R. § 2.112 (1949 ed.).[3] *Inter alia,* an individual is deemed disqualified if "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to

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[3] The petition (p. 3) characterizes the appointment as "permanent"; but the Regulation shows that it was conditional. Section 2.112 of 5 C.F.R., (1949 ed.) states:

"(a) In the following types of appointments investigation designed to further establish the individual's qualifications may be made at any time within eighteen months of the personnel action and removal may be ordered by the Commission if such investigation discloses that the individual is disqualified for Federal employment, and all such appointments shall be considered as subject to this condition:

(1) Original probational.
(2) Reappointments.
(3) Reinstatements.

* * * * *

"(b) The condition "subject to investigation" shall expire automatically at the end of eighteen months from the effective date of the personnel action, except in a case in which the Commission has not made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal. * * *"

the Government of the United States" (5 C.F.R. § 2.104(7) (1949 ed.))—the standard established by Executive Order 9835, 12 F. R. 1935. During the period of her conditional reinstatement, petitioner was not in the classified Civil Service (R. 55-59, 108-109, 119-122).

An investigation of petitioner was accordingly instituted, and on July 28, 1948, the Fourth Regional Loyalty Board of the Commission sent petitioner an interrogatory to be answered under affirmation or oath within ten days after receipt, and advised her that she had the right, upon request, to a hearing before that Board. The interrogatory stated in part (R. 19-25):

> The Commission has received information to the effect that you are or have been a member of the Communist Party or the Communist Political Association; that you have attended meetings of the Communist Party, and have associated on numerous occasions with known Communist Party members.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been a member of the American League for Peace and Democracy, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been a member

> of the Washington Committee for Democratic Action, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.

Petitioner answered the interrogatories under oath, admitting past membership in the American League for Peace and Democracy but specifically denying all other charges, and requested a hearing.

Pursuant to petitioner's request, a hearing before a panel of the Fourth Regional Loyalty Board was held on September 13, 1948 (R. 5, 60). At the hearing, petitioner was represented by counsel of her choice and testified personally. All affidavits offered by her were accepted, and all witnesses presented by her testified. Petitioner was specifically questioned with reference to the charges contained in the interrogatory, but the identity of the informants against her was not revealed. (R. 60, 127, LB.)[4]

On November 1, 1948, the Regional Board notified petitioner and her employer, the Federal Security Agency, that, on all the evidence, reasonable grounds exist for belief that she is disloyal. Petitioner was informed of her right to appeal to the Loyalty Review Board of the Commission, and the Federal Security Agency was instructed to suspend petitioner pending an appeal. (R. 26-27.)

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[4] The transcripts of hearings before the Regional Loyalty Board and the Loyalty Review Board, which are furnished to the court in mimeographed form, shall be referred to hereafter as LB and LRB respectively.

At petitioner's request, a hearing was held by a panel of the Loyalty Review Board on December 8, 1948 (R. 9, 61). At this hearing, the transcript of the hearing before the Regional Board was introduced, petitioner again testified, was represented by counsel of her choice, and submitted additional affidavits in her behalf (R. 61, LRB).

On February 9, 1949, petitioner was informed by the Review Board that the decision of the Regional Board was affirmed. On the same day, notice to that effect was sent to the Federal Security Agency and the Agency was requested to remove petitioner's name from its rolls. (R. 63-65.) Accordingly, on February 11, 1949, petitioner was removed from her employment (R. 30-31). Thereafter, petitioner requested review of the panel's decision by the full Review Board, and on March 18, 1949, the Board declined to review its prior decision (R. 65-67).

On February 17, 1949, petitioner, in a letter to respondent Ewing, Administrator, Federal Security Agency, contended for the first time that she was in the classified Civil Service and that her removal could be effected only under the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, 5 U.S.C. 652), *i.e.*, that the employment agency must make its own independent determination of disqualification (R. 95-96). Upon being advised by the Federal Security Agency that she had been lawfully removed (R. 97-98, 101-104), petitioner

instituted the present action against respondents, individually and in their official capacities, for a declaratory judgment that she had been improperly removed, for an order directing her reinstatement, and for incidental injunctive relief (R. 2-16). Petitioner contended: (1) that her removal was not effected in accordance with the terms of the Lloyd-LaFollette Act, *supra;* (2) that her removal did not comply with Executive Order 9835; and (3) that her removal was in contravention of her constitutional rights.

Petitioner's motion for an injunction *pendente lite* compelling her reinstatement (R. 31-32) was denied (R. 67-68). After respondents answered (R. 69-91), both sides moved for summary judgment and filed supporting affidavits (R. 104, 107). The District Court granted respondents' motion for summary judgment, ruling against petitioner on all three grounds. On appeal, the court below, Judge Edgerton dissenting, affirmed the judgment of the District Court.[5] After holding that the Lloyd-LaFollette Act, *supra,* was not applicable to

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[5] In part, the judgment below was reversed and remanded with instructions to enter a decree holding invalid that portion of the orders of respondents which barred petitioner from Federal employment for three years (R. 122, 136). The court stated that this proscription of employment was not pursuant to a general regulation. "* * * A general order that no person who is denied permanent employment after a conditional appointment be reemployed for three years might well be valid. The bar in the present proceeding appears on the record to be imposed by the Board upon this particular individual as a matter of individual adjudication. * * *" (R. 122). On April 20, 1950, the Civil Service Commission added

petitioner's conditional reappointment, and that the procedure followed by the Loyalty Boards conformed to the requirements of Executive Order 9835 and the Constitution, the court below stated (R. 135):

> We conclude that the Executive Order before us and the proceedings under it violated no congressional limitation upon the executive power of removal; that no constitutional right was involved in this non-appointment or dismissal; and that, in so far as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must when a similar clash arises.

ARGUMENT

The majority opinion (R. 114-136) by Judge Prettyman in the court below decisively answers all contentions which petitioner raises, and we respectfully submit that no aspect of the case needs further review. Here, the petition focuses primary attention on a claimed infringement of petitioner's civil liberties. However, the action which

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to Part 5 of its rules, § 5.101(a) which provides (15 F.R. 2239): "Persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104(a)(1) through (8) of this chapter, may, in the discretion of the Commission, be denied examination, or be denied any of the types of appointment listed in Civil Service Rule II, § 2.112(a)(1) through (6), namely, original probational, reappointment, reinstatement, temporary appointment, interagency transfer, and conversion from excepted, war service indefinite or temporary indefinite appointment to competitive appointment, for a period of not more than three years from the date of the determination of such disqualification."

petitioner has brought is basically simple in character, and its disposition is controlled by familiar principles which make it unnecessary to reach the broad contentions thus made. Petitioner, a conditional reappointee who is not in the classified Civil Service,[6] seeks a declaratory judgment that she was illegally discharged and an order directing her reappointment. Her contention is and must be that the determination of the Civil Service Commission of disqualification for Federal employment is subject to judicial review. On this crucial issue, we submit that a decision of this character by the Civil Service Commission is without the scope of judicial power. It is settled law that the courts will not review the acts of executive officials performed within the scope of executive authority, nor will the courts substitute their judgment for that of the officials.[7]

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[6] Although petitioner contended below that her dismissal was in violation of the Lloyd-LaFollette Act, 5 U.S.C. 652, the petition herein does not urge as error the ruling of both courts below that petitioner was not in the classified Civil Service within the meaning of that Act.

[7] *Decatur* v. *Paulding*, 14 Pet. 497, 515; *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*, 116 U.S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U.S. 316, 324; *West* v. *Hitchcock*, 205 U.S. 80, 85; *Ness* v. *Fisher*, 223 U.S. 683, 691-692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U.S. 549, 555; *Hall* v. *Payne*, 254 U.S. 343, 347; *Work* v. *Rives*, 267 U.S. 175, 183; *Wilbur* v. *United States*, 281 U.S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U.S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U.S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U.S. 540, 543; *Adams* v. *Nagle*, 303 U.S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 131-132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C.A. D.C.), certiorari denied, 339 U.S. 904.

This principle of non-intervention in the internal administration of the executive branch of the Government has been uniformly applied in the field of personnel administration. "The appointment to an official position in the Government, even if it be simply a clerical position, is not a mere ministerial act, but one involving the exercise of judgment. The appointing power must determine the fitness of the applicant; whether or not he is the proper one to discharge the duties of the position. Therefor it is one of those acts over which the courts have no general supervising power." *Keim* v. *United States,* 177 U. S. 290, 293. And see *Eberlein* v. *United States,* 257 U. S. 82; *White* v. *Berry,* 171 U. S. 366; *Friedman* v. *Schwellenbach,* 159 F. 2d 22, certiorari denied, 330 U. S. 838; *Maghan* v. *Board of Comm'rs of the District of Columbia,* 141 F. 2d 274 (C.A. D.C.); *Hammond* v. *Hull,* 131 F. 2d 23 (C.A. D.C.), certiorari denied, 318 U. S. 777; *Love* v. *United States,* 108 F. 2d 43 (C.A. 8), certiorari denied, 309 U. S. 673; *Levine* v. *Farley,* 107 F. 2d 186 (C.A. D.C.), certiorari denied, 308 U. S. 622; *United States ex rel. Taylor* v. *Taft,* 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Gadsden* v. *United States,* 111 C. Cls. 487; *Weinstein* v. *United States,* 109 C. Cls. 579; *Culligan* v. *United States,* 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Bratton* v. *United States,* 90 C. Cls. 604; *Bennett* v. *United States,* 89 C. Cls. 322; *Golding* v. *United States,* 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States,* 55 C. Cls. 174; *Lellmann* v. *United*

States, 37 C. Cls. 128; *Waterman* v. *Somervell*, 34 F. Supp. 695 (S.D. N.Y.), certiorari to C.A. 2 denied, 317 U. S. 630; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Page* v. *Moffett*, 85 Fed. 38 (C.C. D.N.J.). The same principle applies to removals. Indeed the *Keim, Eberlein* and *White* cases were concerned with discharges, and held them nonreviewable.

The courts have intervened only to enforce compliance with specific procedural requirements (*United States* v. *Wickersham*, 201 U. S. 390; *United States* v. *Elchibegoff*, 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694), but not otherwise. Here no statutory right of petitioner was violated.[8]

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[8] Both courts below also found (R. 109-111, 118-119) compliance with the procedural requirements of Executive Order 9835. In contending that the procedure followed by the Loyalty Boards does not conform to the requirements of the Order, petitioner points to Part V of the Order which provides that the standard for the refusal of employment shall be that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States," and asserts that "evidence" is used in its jurisprudential sense and does not include information secretly disclosed to the Loyalty Boards. The question thus raised is simply one of Presidential intention. We submit that the Order, read as a whole, demonstrates conclusively and emphatically that "evidence" means merely all the information available to the Loyalty Boards. Part I(3) of the Order provides that investigations of applicants shall be made at all available sources of information, including files of the Federal Bureau of Investigation, files of any other appropriate Government investigatory or intelligence agency, and files of the House Committee on Un-American Activities. Part IV requires that the names of confidential informants not be revealed; Part II (2b) states that the nature of charges shall be set forth as specifically as security considerations permit. Moreover on March 13, 1948, the President, by Direc-

Under the rule established by the above cases, the action of the Civil Service Commission herein is not subject to judicial review. The rule has particular application to the instant case. Here petitioner, as both courts below held (R. 108, 119-122), was not in the classified Civil Service. She was given a conditional reinstatement expressly made subject to investigation, and was in no better position, therefore, than any outsider who applies for employment with the United States Government. In such circumstances, the right of the executive branch of the Government to refuse to employ petitioner if in its opinion she did not have the requisite qualifications would seem clear. As the court below observed (R. 123): "* * * If her status was merely that of an applicant for appointment, as we think it was, her non-appointment involved no procedural constitutional rights. Obviously, an applicant for office has no constitutional right to a hearing or a specification of the reasons why he is not appointed. * * *" It is submitted therefore that the court below was clearly correct in holding that it was not within its province to interfere with the Civil Service Commission in its refusal to approve petitioner for Government employment.

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tive, unequivocally directed that all reports, records and files relating to the loyalty program be preserved in strict confidence. 13 F. R. 1359. As the court below cogently observed (R. 119), "If the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and would have corrected the error."

Friedman v. *Schwellenbach*, 159 F. 2d 22 (C.A. D.C.), certiorari denied, 330 U. S. 838, involved an almost identical situation.

Although as stated, we think petitioner's position no different from that of a person seeking employment, the above authorities establish that the same rule would govern removals from office. In the latter case, as well as in the former, the executive action is not reviewable, and the employee has no right to a hearing in the judicial sense.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 49.

DOROTHY BAILEY, *Petitioner,*

v.

SETH W. RICHARDSON, ET AL., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

BRIEF FOR PETITIONER.

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PAUL A. PORTER,
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BRIEF FOR PETITIONER.

OPINIONS BELOW.

The opinions in the Court of Appeals, i.e., the majority opinion of Judge Prettyman and the dissenting opinion of Judge Edgerton (R. 114), have not yet been officially reported. The oral opinion of the District Court (R. 107-111) has not been officially reported.

JURISDICTION.

The judgment of the Court of Appeals was entered on March 22, 1950. A petition for a writ of certiorari was filed April 19, 1950 and granted on June 5, 1950. The jurisdiction of this Court is invoked under Title 28 U. S. C. § 1254 (formerly §§ 239 and 240 of the Judicial Code).

QUESTIONS PRESENTED.

I. Whether a person may be adjudged ineligible for government service and dismissed from a non-sensitive position, by administrative proceedings before a loyalty board, because of doubt as to her loyalty, (1) where there is no evidence against her whatever, (2) where the only evidence presented consists of a conclusive showing in her favor, and (3) where the only basis for the determination against her is secret information obtained from confidential informants whose identities are unknown to the court, the employee or the loyalty board making the decision.

The above question involves the following subsidiary questions:

a. Whether such administrative proceedings are consistent with the Executive Order under which they were held which provides for "maximum protection" to the government and "equal protection" to employees against "unfounded accusations of disloyalty" and which further provides that the findings must be after "hearing" and on "all the evidence."

b. Whether such administrative proceedings are consistent with the Constitution and in particular with the First, Fifth and Sixth Amendments.

c. Whether an executive order purporting to authorize the determination of ineligibility for government service generally without regard to the nature of the position by administrative finding of a reasonable doubt as to loyalty is authorized by law or is valid under the Constitution.

STATUTES AND REGULATIONS INVOLVED.

Executive Order 9835 (the so-called Loyalty Order), 12 F. R. 1935, March 12, 1947, is set forth in the Appendix to this brief.

STATEMENT OF THE CASE.

A. Petitioner.

Petitioner, Dorothy Bailey, has been in the government service almost continuously since November 1933. None of the positions which she held was in any sense secret or sensitive. (R. 34) She was engaged in helping Employment Services of the various States in training their personnel. Her work was based on a public document issued by the United States Employment Service and the training programs she developed were also available to the public in public libraries. (R. 34) She never had access to any secret information of any kind nor was her service in training employees connected with any security or sensitive agency.

Petitioner had received Civil Service status in 1940. (R. 4, 70) In June 1947 due to a drastic reduction in force in the USES, petitioner was separated from the payroll. On March 25, 1948, she was reinstated to her old position as staff training supervisor in the USES. On May 28, 1948, she was advised that her reinstatement as a classified civil service employee was made permanent. (R. 4, 18, 19)

Petitioner's service in the United States government has been consistently good and she is recognized throughout the country as an expert in the specialized field of staff training. Her efficiency ratings were uniformly high. (R. 4, 32, 71)

B. The Loyalty Proceedings.

On the 31st day of July, 1948, some two months after her reinstatement was made permanent, petitioner received an interrogatory from the United States Civil Service Com-

mission requesting certain information purporting to be relevant to her employment with the United States government. On August 9 petitioner, under oath, answered the interrogatories which raised questions as to her membership in and her association with various organizations. No formal charges were at any time served upon her. (R. 5, 20-25, 71, 72)

On September 13, 1948, pursuant to notice, she appeared before a Board of the Fourth Civil Service Region. The Board stated that it was inquiring whether "reasonable grounds exist for the belief that the person involved is disloyal to the government of the United States", a standard set forth by Executive Order 9835, 12 F. R. 1935, March 21st, 1947, the so-called Loyalty Order. (R. 5, 72) At the said purported hearing no persons appeared to testify against Miss Bailey. (R. 72) She was asked questions which stated or indicated that the Civil Service Commission had information that she had been a member of or affiliated with the Communist Party. (R. 6, 74)[1] She denied these charges specifically, affirmatively and circumstantially and refuted all implications to this effect. (See Loyalty Board Hearing (L. B.) 15-19, and *passim*)[2]

Petitioner was examined at great length during the hearing on a number of subjects having little or no relation to the questions appearing on the interrogatories. In ad-

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[1] There was some question about two other organizations. One of these was the American League for Peace and Democracy with which Miss Bailey had a brief and casual connection (R. 23, 24). With the other, the Washington Committee for Democratic Action, she stated she had no connection whatever (R. 24). Very little attention was paid to these allegations in the hearings and they were apparently of no concern to the Loyalty Review Board.

[2] Transcripts of the hearing and of the later hearing before the Loyalty Review Board are in the Record. These parts of the Record have not been printed but are being supplied to the Court in mimeographed form as they were to the court below. The Loyalty Board hearing will be cited as L. B., the Review Board Hearing as L. R. B., certain compiled affidavits as Aff., and a Personal History Statement as P. H.

dition to petitioner's specific denials that she had any relationship or sympathy with the Communist Party or any activities which are in any way connected with the Communist Party or with Communism, petitioner denied affiliation with any organization that advocated the overthrow of the government of the United States. (L. B. 14) No person appeared to testify against her. (R. 7, 75)

The allegations of membership or affiliation with the Communist Party were of most general and indefinite form. They were not detailed. They had no reference to times, places or dates and were in substance blanket generalized allegations. (L. B. 15-19) The informants against her were not identified directly or indirectly and it appeared later that even the Board members had no knowledge of who the informants were. (L. R. B. 11)

Petitioner produced in her behalf witnesses who testified affirmatively as to her loyalty. The Minister of the Metropolitan Memorial Methodist Church of Washington, D. C., appeared. (L. B. 106, 107) Various officials of the USES appeared. (L. B. 48, 107, 114). In addition, affidavits were submitted by persons who could not be present but who were prominent in business and who knew Miss Bailey. (Aff. 1, et seq.) (R. 5, 73) The record made before the Panel consisted entirely of petitioner's testimony and the testimony of others favorable to her without a single syllable of evidence to the contrary. (L. B.)

Statements were made by the Examiner of the Board and by the Board members that secret files contained allegations that investigating agencies of the government had received information from informants, some of whom were certified as reliable, which information was contrary to her testimony and the testimony of the witnesses who appeared in her behalf. These files were not available for examination by Miss Bailey or her counsel, nor was she permitted to know their substance except as generally stated by the Chairman of the Review Panel, as hereinafter described. The persons who supplied this information did not supply it

under oath (R. 7, 75); they were not identified to the petitioner or to the Board members. (L. R. B. 11, 72)

Nevertheless, on November 1, 1948, the Board advised Miss Bailey that ". . . it has been found that, on all the evidence, reasonable grounds exist for belief that you are disloyal to the Government of the United States.

"Your application for or eligibility from each of the examinations mentioned below has been cancelled[3] and you have been barred from civil service examinations in the Federal service for a period of three years from October 29, 1948. When the period of debarment has expired the Commission will, upon request, consider the removal of the bar." (R. 26)

On the same day the Board wrote the United States Employment Service advising of its finding and stating that "Therefore, she (Miss Bailey) has been rated ineligible for Federal employment; she has been barred from competing in civil service examinations for a period of three years, and your office is instructed to separate her from the service." (R. 27) The Board's instructions were followed and Miss Bailey was suspended pending appeal. (R. 28, 29)

Miss Bailey appealed to the Loyalty Review Board, and was heard on December 8, 1948. There, she again appeared and testified at length on her own behalf (L. R. B.) and presented an affidavit which clearly, specifically and in detail established that she could not have been guilty as alleged of membership in the Communist Party. (P. H.) Not only her own affidavit, but the affidavits of others were presented both as to her character and as to her public positions contrary to the position which any Communist could have

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[3] At the foot of the letter was a list of civil service registers on which Miss Bailey's name appeared as eligible for appointment to government positions on the date of the Loyalty Board's letter and from which her name was being removed. They were as follows:

"Examinations: Training Specialist, CAF-11, 12, 13 (Central Office, Civil Service Commission).

"Administrative Officer CAF-11, 12, & 13.

"Attachment Training Specialist CAF-11, 12, 13 (Fourth Regional Office, Civil Service Commission)." (R. 27)

taken. She submitted in her behalf some 60 affidavits which came from persons who knew her well. They came from 15 states and included bankers, corporation officials, federal officials, state officials, union members, former union members, etc. (Aff. See also R. 43-45) No one appeared against her. No persons purporting to have knowledge testified or even made a statement against Miss Bailey. (R. 9, 79)

Her affirmative case established that she had publicly and to the knowledge of a number of the affiants taken positions inconsistent with the charge of membership in or affiliation with the Communist Party. Thus it was clearly established not only by petitioner's testimony and her own affidavit (P. H. 7-10) but by the testimony of a number of other persons that she had favored the Marshall Plan, a position notoriously opposed to that of the Communist Party. (L. B. 53, 112, 113) (See e.g., Affs. Messrs. Limbert and McCarthy.)[4] In 1940 during the period of the Nazi-Soviet Pact, she had favored Lend-Lease and was very critical of the Soviet Union's position. (L. B. 54, 55, 112, 113, Aff. McGee) In her own union she had urged that the officers sign the non-Communist affidavit. (P. H. 9, Aff. Limbert) She had opposed in her union a foreign policy resolution which was widely publicized as being pro-Russian and had suggested another resolution which was the official CIO resolution on foreign policy at the time. (P. H. 9, Aff. Limbert)

In the face of this there was only, according to the Chairman of the Review Board, secret information in the secret files given by persons not under oath and not known even to the members of the Loyalty Board and the Review Board. (L. R. B. 11, 72) At the hearing before the Loyalty Review Board (part of the record herein), the Chairman of the Panel made the following statement (L. R. B. 10, 11):

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[4] These affidavits are in unnumbered pages separated to show first the affidavits submitted to the lower board, then those submitted to the Review Board. Within these categories the affidavits are included in alphabetical order.

"The charge developed in these interrogatories I don't understand is confined to a union. It is that she was a member of the Communist Party in the District of Columbia as early as 1935 and that in the early days of the War period she attended Communist Party meetings, and later when she became active in the Union she continued her membership—that is the communistic membership. Again about 1936 she was a known member of the so-called closed group of the Communist Party operating in the District of Columbia, and was one of those responsible for establishing a minority group in the Central Labor Council. Again that Bailey was a member of the Communist Party and has been for seven or eight years.

• • •

" . . . That Miss Bailey is either a member of the Communist Party or is completely dominated and controlled by them to the extent she follows their policy and instructions and has been doing so for a period of some eight years. That Miss Bailey is considered a member, if not an actual member one who is entirely controlled by the Communist leaders in the District of Columbia. Then that constitutes, to paraphrase as I did it, the basis for the charge against Miss Bailey."

• • •

CHAIRMAN RICHARDSON:

"I can only say to you that five or six of the reports come from informants certified to us by the Federal Bureau of Investigation as experienced and entirely reliable.

MR. PORTER (Counsel for Miss Bailey):

"We would like to have their names, and I would challenge any one of them to state it publicly in a non-privileged form.

CHAIRMAN RICHARDSON:

"I want to put it up to you in the light of which the Regional Board was considering it. It wasn't on the basis of union activity; it was on the basis of a communistic activity.

MR. PORTER:

"Mr. Chairman, would we be privileged to obtain at least this much information? Those informants which are judged reliable by the Federal Bureau of Investigation, have they been active in the Federal Workers Union activity?

CHAIRMAN RICHARDSON:

"I haven't the slightest knowledge as to who they were or how active they have been in anything."

At pages 71 and 72 (L. R. B.), the Chairman, referring to the statement of confidential informants, stated:

" . . . If this testimony is true, it is neither gossip nor malicious. We are under the difficulty of not being able to disclose this.

MR. PORTER:

"Is it under oath?

CHAIRMAN RICHARDSON:

"I don't think so."

The answer admits that the identity of informants was not disclosed "nor was the information given under oath". (R. 75) Nevertheless, that Board on February 9 wrote Miss Bailey stating that the Board had reached the conclusion that the evidence in the entire record was sufficient to sustain the finding and decision of the Fourth Regional Loyalty Board and that the Federal Security Agency had been asked to dismiss the plaintiff at once. It affirmed "the decision of ineligibility by the Fourth Regional Loyalty Board." (R. 63, 65) No statement of reasons was made other than the general allegation above.

Miss Bailey was formally removed from her employment on the basis of the order of the Review Board panel (R. 30).

Thereafter, Miss Bailey requested review by the full Loyalty Review Board rather than by a Panel and this was denied on March 18. (R. 11, 67, 81, 82)

C. Court Proceedings.

The present action was then commenced requesting a declaration that appellant was illegally dismissed and held ineligible for government service. Reinstatement and other relief was requested. (R. 15, 16) The defendants are the Federal Security Administrator, the members of the Loyalty Board and Review Board Panels and the Civil Service Commissioners. (R. 3) By reason of a subsequent transfer of the functions of the USES to the Department of Labor, the Secretary of Labor was added as a party. (R. 148) Cross motions for summary judgment were filed by appellant and appellees. (R. 104, 107) The District Court (per Holtzoff, J.) denied the appellant's motion for summary judgment and granted the motion of appellees for summary judgment. (R. 107-111)

The Court of Appeals by a 2-1 vote sustained the dismissal of petitioner and the finding making her ineligible for government service. It reversed only the provision of the order of the Civil Service Loyalty Board barring her from competing in civil service examinations for three years on the ground that such a bar was punishment which could not constitutionally be imposed without evidence in the legal sense as distinguished from secret "information." The Court of Appeals remanded the case for the entry of the decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136) This mandate has been stayed pending the disposition of this petition.

Judge Edgerton in a dissenting opinion (R. 136) held that the dismissal was illegal because (1) the Executive Order required that the finding of ineligibility must be "on all the evidence" and therefore could not be made upon secret information; (2) any dismissal for disloyalty and declaration of ineligibility for federal employment is a

punishment requiring the safeguards of a judicial trial; and (3) the dismissal and adjudication of ineligibility in this case abridged freedom of speech and assembly.

SUMMARY OF ARGUMENT.

I.

Executive Order No. 9835 Requires that Findings of Disloyalty and Ineligibility for Government Employment Be Supported by Evidence in the Record.

(1) The Order specifically provides for hearings and for decisions "on all the evidence". Its preamble states its purpose to be to provide "equal protection" to the government and to the employee. The language is plain and the intention is explicit. The Order requires a hearing in the traditional American sense. No such hearing was given in the present case. The decision was admittedly based on secret information undisclosed to the accused. The only evidence in the record was favorable to the employee.

(2) A decision requiring hearings on evidence will not impede or hamper the loyalty program. In many agencies, loyalty boards now require evidence against employees to be produced. The program operates successfully and fairly in those agencies. A decision that the loyalty boards must make their rulings only on evidence will merely affirm as a legal requirement the procedure now in effect in many agencies. No advantage can be gained, as the experience of many non-sensitive agencies shows, by abandoning the principle of giving employees a fair hearing in a real sense. No danger exists in such agencies which justifies the abandonment of this principle of fairness and justice.

(3) Congress after full hearing and study of the problem of security has recently passed a bill dealing with dismissals in sensitive agencies. Here the danger is real and not based merely upon the understandable desire that disloyal persons should not enjoy the privilege of govern-

ment employment. Nevertheless, Congress deemed it sufficient for national security to authorize sensitive agencies to sever suspected individuals from the particular sensitive agency for which they worked in cases where there was no hearing on "all the evidence." No finding of disloyalty and general ineligibility was considered necessary for security where employees were discharged from sensitive agencies on undisclosed information. *A fortiori* in non-sensitive agencies it is still safe to treat the majority of government employees according to the principles of American justice.

(4) The reasons given by the majority below are invalid.

a. The fact that "material and information" collected by investigative agencies may be withheld under appropriate sections of the Order is in no way an indication that adjudications of disloyalty were intended to be made on the basis of such undisclosed information. The standard for a finding of disloyalty is specifically required to be based on "all the evidence." In this connection the terms "material and information" do not appear.

b. The majority's argument that the President must have known about this case and is therefore presumed to approve it is not an appropriate canon of construction.

c. The argument of the majority that it is following the administrative construction is invalid because here there has been no consistent administrative construction that an adjudication of disloyalty may be made without evidence.

d. The argument of the majority below that there is a conflict between the interests of security and the case for Miss Bailey has nothing to support it. In adopting this basis for its decision the court below usurped the functions of the President and the Congress and wrote into the law its own notions of security requirements. Such notions are at variance with the views which both the Congress and the President have adopted.

II

The Declaration of Ineligibility for Federal Employment is a Punishment Which Has Been Illegally Inflicted Without Due Process.

(1) The Loyalty Board's decision against Miss Bailey is a finding of disloyalty and consequent ineligibility for government employment, made without evidence. The *Lovett* case (*United States* v. *Lovett*, 328 U. S. 303) establishes that such a declaration of ineligibility is punishment. The Sixth Amendment requires a judicial trial before such punishment may be imposed. Even if an administrative trial were held sufficient to impose such a punishment, it could only be on condition that it was a fair hearing based on evidence which an employee has an opportunity to meet.

The case does not involve the dismissal of an employee because he or she does not have the special qualifications of reliability required for a particular position. Such dismissals may properly be made without evidence. The dismissal here has no basis other than that Miss Bailey is found to be disloyal and as a consequence ineligible for government employment. In such a case the Constitution requires at least a fair trial.

(2) The court below recognized that under the *Lovett* case a declaration of ineligibility is punishment. It thought it had removed this defect and made Miss Bailey eligible by its partial reversal of the Board's order, striking out the provision barring her from taking civil service examinations for three years. It was clearly in error in this. The whole tenor and purpose of the order is to prevent persons found to be subject to reasonable doubt as to loyalty from serving the government in any capacity. So long as the findings of disloyalty stand Miss Bailey is permanently and absolutely ineligible even if she succeeds in passing civil service examinations.

The court would have been in error in assuming that a dismissal should be sustained even if it had reversed the

finding of disloyalty and thus in theory at least made Miss Bailey eligible. If the loyalty finding is reversed the court must restore Miss Bailey to the position she lost because of that illegal finding. Any other conclusion would give complete sanction to a declaredly illegal ruling.

III.

The Order Abridges Freedom of Speech and Assembly.

The vague standards of the order permit loyalty boards to consider and determine cases on the basis of the opinions and associations of employees. This dangerously limits their freedom of speech at a time when it is most important that government employees be free to discuss, without fear of suspicion of disloyalty, every aspect of national policy. Every side of such questions must be debated and considered without fear that a minority view might subject its holder to a finding of disloyalty on secret accusation. If not, the eventual policy which emerges cannot be based on a realistic appraisal of the complex factors which disturb the world today.

ARGUMENT.

The questions which raise the constitutionality of the decision need not be considered until the Court first determines whether the procedure followed by the Loyalty Board conformed to the requirements of the Executive Order which established the Board and defined its authority. If it does not conform to this Order, then for that reason alone the Court should declare the findings and sentence against Miss Bailey invalid.

We will therefore address ourselves first to the question of the proper interpretation of the President's Order.

I.

EXECUTIVE ORDER NUMBER 9835 REQUIRES THAT FINDINGS OF DISLOYALTY AND INELIGIBILITY FOR GOVERNMENT EMPLOYMENT BE SUPPORTED BY EVIDENCE IN THE RECORD.

1. The plain intention of the Order is to provide a fair hearing under traditional American standards.

The fundamental question is whether the President's Executive Order 9835 requires a fair hearing. Plainly no fair hearing was given petitioner. She asserts that such a hearing is required.

The portions of the Executive Order relevant to our argument here read as follows:

The Preamble states:

> "Executive Order No. 9835, 12 F. R. 1935.
>
> "Prescribing Procedures for the Administration of an Employees Loyalty Program in the Executive Branch of the Government
>
> • • •
>
> "Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:
>
> "Now, Therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, • • • it is hereby, in the interest of the internal management of the Government, ordered as follows:"

Part V is headed "Standards" and begins:

> "1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."

Part II of the Executive Order provides for the appointment of loyalty boards "for the purpose of hearing loyalty cases" and states that an employee "who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board. . . " It provides further that "the rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, . . ."

In short, the President's Executive Order was designed not only to oust disloyal employees but, as its preamble stated, it was equally designed to provide "protection from unfounded accusations of disloyalty" to the loyal employees of the government. It provided for "hearings" before any adverse decision and it provided that such an adverse decision could be made only "on all the evidence."

It is plain that the Executive Order was not complied with in the present case. Miss Bailey was not afforded protection against an unfounded accusation of disloyalty. She was not given a hearing in any true sense of the word and the decision against her was not based on evidence. There is before this Court the transcribed record of the proceedings before the Regional Board and the Loyalty Review Board (LB and LRB). The record before this Court contains not one syllable of evidence against Miss Bailey. The decision against her was based not on evidence in the record or on any evidence whatsoever. The decision was frankly stated to be based upon secret reports, not disclosed to the employee, which were made to the FBI by informants not under oath whose identity was concealed even from the loyalty boards. The loyalty tribunals were in no position to weigh the reliability of information given by informants unknown to them. They acted in blind reliance on the representations of an investigative agency that some of the information it had received came from informants believed to be reliable. Such a procedure is

not a decision on evidence, after hearing, which the Executive Order provided.

The words "evidence" and "hearing" are not words of vague meaning. Evidence means sworn testimony of witnesses either in person or by affidavit. See Rule 43 of the Federal Rules of Civil Procedure. Rules applicable in court may be relaxed before administrative tribunals but by no stretch of the imagination can the term evidence include the secret reports relied on in the present case. This Court has also had occasion to consider the meaning of a requirement of a hearing. Thus, in *Morgan* v. *United States*, 304 U. S. 1, 18, 19, it stated:

> "The right to a hearing embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them. The right to submit argument implies that opportunity; otherwise the right may be but a barren one . . . Congress, in requiring a 'full hearing', had regard to judicial standards—not in any technical sense but with respect to those fundamental requirements of fairness which are the essence of due process in a proceeding of a judicial nature."

And in *Interstate Commerce Commission* v. *Louisville and Nashville R. Co.*, 227 U. S. 88, 93, it said " . . . manifestly there is no hearing when the party does not know what evidence is offered or considered, and is not given an opportunity to test, explain, or refute."

Plainly, in basing their rulings on secret information supplied by unidentified informants, the loyalty boards were not making findings on "evidence", after "hearing" as those terms have been understood by this Court. Equally plainly, they were not according employees the "protection from unfounded accusations of disloyalty" which the Executive Order promised them.

Assuming for the purpose of this argument that the President could constitutionally have imposed on Dorothy Bailey such personal disgrace and economic ruin, without

evidence, it is not reasonable to believe that he intended to do so in view of the plain language of the Order.

The President set up a procedure of hearings and appeal which, on their face, purported to provide a fair administrative hearing. The court below interprets them to mean that the employee has no protection whatever and that even the reviewing courts cannot question the certificate of an investigating agency as to what weight they should give the secret information. The so-called "hearings" and "appeals" mean under the construction of the court below only that the employee must defend himself without knowing the information which the Board has against him and without being given any real guide or clue as to how he may meet it. The court below is saying that when the President said that the employee was to retain the equal of "maximum protection" he did not mean maximum protection; that when he said "evidence" he did not mean evidence; that when he said "hearing" he did not mean hearing in even the minimal sense of the term. Such a departure from the plain meaning of words and from the avowed purpose of the Executive Order should not be permitted.

As this Court has stated in another context, "We do not believe that such a major departure from that long tradition as is here proposed should be lightly implied", *Hecht Co.* v. *Bowles*, 321 U. S. 321, 330, and later " . . . if Congress desired to make such an abrupt departure from traditional equity practice as is suggested, it would have made its desire plain." *id.*

The fact that we are dealing with government employment which is a privilege rather than a right[5] does not

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[5] But *cf.* Universal Declaration of Human Rights as passed and proclaimed by the General Assembly of the United Nations on the tenth day of December 1948, as follows:

"Article 21 (1) Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.

(2) *Everyone has the right of equal access to public service in his country.*" (emphasis supplied)

authorize a more restrictive interpretation. Thus this Court has held that aliens are entitled to a fair hearing in deportation proceedings even though the right to remain in this country is, like the right to work for the government, a privilege. And the right to a hearing was held available even though there was no express provision for a hearing in the statute authorizing deportation. This Court has been careful to see that the hearings are in fact fair and that the rulings are based on evidence. See cases cited in the dissenting opinion below (R. 139, 140). And aliens were at the last term of Court held entitled to the full procedural protection granted by the Administrative Procedure Act. *Wong Yong Sun* v. *McGrath*, 339 U. S. 33. Similarly in *U. S. ex rel Knauff* v. *Shaughnessy*, 338 U. S. 537 where the question was one of the exclusion of an alien, an area of undoubted and absolute administrative discretion, the Court split on the question of reading into the War Bride statute a requirement of fair hearing.

Petitioner is not in the unprotected position of the alien in the *Knauff* case. In the present case the requirement of fair treatment need not be supplied by implication. Executive Order 9835 is clear in its desire to provide "protection" by "hearings" on "evidence".

In the past where tribunals have made decisions on the basis of secret information while purporting to give accused a hearing, it has shocked the conscience of jurists and laymen alike. Dreyfus was convicted on a secret dossier sent by the French Ministry of Justice to the hearing tribunal. The case aroused worldwide indignation and five years later the French Court of Cassation reversed. *The Dreyfus Case* by Alfred and Pierre Dreyfus, Yale University Press, 1937. German judges under Hitler used secret police records as evidence, justifying such use on the same grounds invoked here, i.e., security for the investigative agencies. These German judges are now in jail. Their reception of such material as evidence has been characterized by the President's own tribunal as the "final degra-

dation of the judiciary". *United States* v. *Joseph Alstoetter, et al.*, United States Military Court at Nuremberg. Germany.[5a]

Surely it is not conceivable that the President, in devising procedure to protect the accused equally with the government, authorized the use of this sort of procedure.

2. The present procedures of many of the loyalty boards in nonsensitive agencies show that the effectiveness of the loyalty program will not be impaired by requiring that the accused be confronted with the evidence against her.

No legitimate objective of the loyalty order will be adversely affected by a requirement of a hearing on evidence. The suggestion that the loyalty program will be unsuccessful unless loyalty boards are allowed to place blind faith in unidentified informants who are vouched for by some unidentified personnel of the FBI, is at variance with both the necessities of the government and experience of loyalty boards generally.

The facts concerning the procedure in loyalty hearings by the various boards are not published. It is our experience, however, that the practice of a great many of the government loyalty boards, when issues of fact are controverted, is to seek and obtain the appearance of witnesses against the employee for purposes of testimony and for cross-examination. We submit herewith a description of the loyalty board machinery, based upon our own experience. We invite the government for the benefit of the Court to use its own resources of access to the loyalty files to revise and supplement this information:

A. There are two types of loyalty boards with original jurisdiction. One set of boards operates within a particu-

[5a] The record is available at the Library of Congress.

lar department or agency of the government. Another group of boards is Civil Service Regional Loyalty Boards operating in Civil Service Regions throughout the country.

The agency boards usually consist of from three to five employees of a particular department or agency. These boards generally sit en banc although sometimes there is a substitution of membership. They have continuous supervision over the administration of the program in the agency, and are in charge of formulation and serving charges and conducting hearings. In some agencies the boards act on a full time basis or on a substantial part time basis. In other agencies they sit only occasionally. These boards are available for employees of the agency. Before these agency boards the procedure is universally followed of serving a set of formal charges and giving opportunity to answer. Agency board rulings are appealable to the head of the agency. From his adverse ruling an appeal may be had to the Loyalty Review Board.

By regulation of the Civil Service Commission, however, these agency boards are excluded from judging the loyalty of the employees of the agency who are newly appointed, or who have transferred from another government agency, or, as in the case of Miss Bailey, who have been laid off and reinstated to their old jobs.[6]

Employees in these categories are heard before Regional Boards of the Civil Service Commission. These Regional Boards are composed of a great number of private citizens who sit in panels of three selected for each particular case. In the case of Miss Bailey, the panel selected consisted of three lawyers engaged in private practice, one from Washington, D. C., one from Norfolk, Virginia, and one from Baltimore, Maryland.

The Civil Service panels do not serve charges but

[6] The validity of this allocation of functions was upheld by the court below against petitioner's objections (R. 121)

merely issue interrogatories to be answered.[7] Either from the interrogatories themselves or from the interrogatories as supplemented by questions before the board, the employee is usually able to obtain some idea of the issues which the board deems relevant. But the matter is not presented in forms of specific charges with specific answers, as is the case before the agency boards.[8] Decisions of Regional Boards are appealable to the Loyalty Review Board.

Neither the agency boards nor the review board on appeal make any decision or write any opinion which is available to the employee other than an ultimate conclusion, i.e., that there is reasonable ground for believing the employee

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[7] For example see the statements at LB 106, 110, 111 by the Chairman of the Regional Board that "Nobody has presented any charges" and "it sounds like you [a witness] have been informed that charges have been brought by the Board which is not true and which is not a fact."

[8] The procedure of the regional boards suffers in exaggerated form from the deficiencies described in *Morgan* v. *United States*, 304 U. S. 1, 19, as follows:

> "The administrative proceeding was initiated by a notice of inquiry into the reasonableness of appellants' rates. No specific complaint was formulated and, in a proceeding thus begun by the Secretary on his own initiative, none was required. Thus, in the absence of any definite complaint, and in a sweeping investigation, thousands of pages of testimony were taken by the examiner and numerous complicated exhibits were introduced bearing upon all phases of the broad subject of the conduct of the market agencies. In the absence of any report by the examiner or any findings proposed by the Government, and thus without any concrete statement of the Government's claims, the parties approached the oral argument.
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> "Nor did the oral argument reveal these claims in any appropriate manner . . . The oral argument was of the sort which might serve as a preface to a discussion of definite points in a brief, but the Government did not submit a brief. And the appellants had no further information of the Government's concrete claims until they were served with the Secretary's order."

The Regional Boards do not have counsel and no contentions are ever stated except as they are implied from questions asked by Board examiners or Board members.

is disloyal or that there is not reasonable ground for believing that the employee is disloyal. There is an indication in the present case that the lower boards may write opinions stating their views. (See questioning by Mr. Seasongood, LRB 95.) But such opinions if they exist are not made available to the employee. Nor is any indication given except indirectly to the employee as to which of the inquiries directed to him are believed of substance.

All decisions favorable or unfavorable are either reviewed or audited by the Loyalty Review Board. The Loyalty Review Board, like the Regional Board, is composed of private citizens, who sit in panels of three. The full board has rarely been requested to sit on any case. It refused such a request in the present instance (R. 67).

B. On the hearing procedure, the loyalty boards do not have a specific consistent practice. They vary widely. In a great many cases there is no dispute as to fact. The charges are in general reasonably specific. The employees frequently admit allegations, e.g., of membership in organizations and offer explanations. In other cases allegations of time and place are so specific that documentary proof or disproof is possible. Thus, in perhaps the great majority of cases the right to prefer charges and require answer under oath is sufficient. No issue of fact or veracity is presented.

Where such an issue does exist, however, many of the agency boards are very meticulous in requesting from the FBI precise details as to charges. These agencies specify to the employees the times and place of alleged actions and *the names of informants*.[9] They make every effort to secure attendance of witnesses against employees. Since they have no subpoena power and cannot pay travel expenses, some of the agency loyalty boards make it a practice to travel wherever necessary throughout the United States to

[9] There are some variations in procedure. For example, some boards will reveal the names of identified informants only if the informant has stated his willingness to appear at the hearing.

hear the testimony of witnesses against employees. Thus, in a great many proceedings before agency boards, the informants against the employee have not only been identified but have appeared as witnesses and been subjected to cross-examination.

On the other hand, some agency boards accept the initial report of the FBI and make no attempt to secure further information or the attendance of witnesses. This was particularly true of the Civil Service regional boards at the time of the Bailey case.

The regional boards are composed of personnel changing from case to case. They have important private business or professional interests and devote occasional days to the work of the Boards. Accordingly they have not developed as consistent attitudes with respect to the protection of employees as have many of the agency boards. For example, we know of no case in which a regional board has sat outside its own region to hear testimony against employees. The Fourth Regional Board before which Miss Bailey appeared, so far as we know, had never secured the testimony of witnesses until that time. However, on April 20, 1949, after the instant case had been filed in the District court the Loyalty Review Board issued a directive to all loyalty boards requiring them to make every effort to secure the testimony of adverse witnesses and to certify this fact in their decisions.[10]

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[10] The text of the directive is as follows:

"United States Civil Service Commission
Washington 25, D. C.

April 20, 1949

Memorandum No. 41

To All Executive Departments and Agencies

Subject: Attendance of Witnessess at Hearings

All reasonable efforts should be made, wherever practicable, to induce all identified witnesses who have given the FBI or elsewhere, pertinent information adverse to the employee and are willing to do so, to attend the hearing, testify in the employee's presence

In substance, the practice with respect to the presentation of evidence against employees has depended largely on the discretion of the individual boards. Thus in the present case the practice of this board (1) in accepting the generalized allegations against Miss Bailey detailed by Chairman Richardson of the Review Board (see pages 7-9, supra) (2) in not obtaining more detailed time and place allegations and (3) in not obtaining the names of the witnesses or attempting to procure their appearance, was at variance with the policies followed by many agency boards at the time. That policy was, we believe, the governing policy of the Fourth Regional Board at the time. It was not, however, a policy adopted by loyalty boards generally, and indeed it could not be followed even by the Fourth Region after the directive of April 20, 1949.

Although this is merely the observation of one law firm which has appeared before a number of government loyalty boards, we believe that this observation is sufficient to establish that a decision requiring a hearing on evidence in accordance with the Executive Order will not interfere with

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and subject themselves to cross examination. All Loyalty Boards are instructed, whenever practicable, to invite every witness who (1) is personally identified; (2) has given the FBI pertinent information adverse to the employee; and (3) has not expressly indicated his unwillingness to testify at the hearing, to testify at the hearing. The invitation should be extended in a suitable manner, a reasonable time in advance of the hearing, if possible, so as to afford witnesses a reasonable opportunity to attend and should state the time and place where the hearing will be held and *that the Board cannot pay witness fees, or reimbursement for travel or other expense.*

If any such witness declines or fails to appear as a witness after being thus invited by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere.

It is desired that each Board shall suitably certify in its ultimate reported determination, that the provisions of this Directive have been duly complied with.

Seth W. Richardson,
Chairman
Loyalty Review Board."

the carrying out of the loyalty program. It will merely be requiring that all boards follow the better practice adopted by many loyalty boards in the agencies.

3. The reasons given by the court below for construing the term "evidence" to include undisclosed secret information are not supported either by the Order itself, by any consistent administrative interpretation of the Order or by the necessities of security.

We shall now examine the reasons why the court below construed the President's loyalty order as it did. Its conclusion we believe rests on several grounds, some expressed and others implied.

(i) The loyalty order expressly declares that investigative agencies may refuse to disclose the names of confidential informants under certain limited circumstances (Part IV, 2). An executive declaration requires such information to be kept in confidence as against legislative subpoena.[11] The court from these undoubted facts arrived at the conclusion that the President's Executive Order intended such secret information to be treated as evidence. This does not follow. Indeed, the executive order plainly distinguishes between investigative "material and information" which may be kept confidential and "evidence" which is the basis for an adverse conclusion.

Part I of the Order requires loyalty investigations of every applicant for civil employment in the government. Part II makes the head of each department responsible that disloyal persons currently employed are not retained in office. In carrying out that responsibility, the head of each agency is directed to prescribe loyalty determination procedures which are in accordance with the provisions of the Order.

Part IV of the Order is entitled "Security Measures in Investigations." It has nothing to do with the procedure or standards to be applied at the hearings. It requires the investigative departments or agencies of the government

[11] 13 Fed. Reg. 1359.

to supply on request of the head of an agency "*all investigative material and information*" they have (the term "evidence" is not used here). It specifically provides that an investigative agency may refuse to disclose the name of a confidential informant where it certifies in writing that non-disclosure is essential for the protection of the informant or the investigation of other cases. In such a situation the investigative agency must furnish "*sufficient information* about such informants on the basis of which the *requesting department or agency* can make an adequate evaluation of the information. . . " (Emphasis suppied)

Plainly the Order contemplates that the agencies and boards should use such secret material, information and reports as the basis either for bringing charges or conducting further investigations. Such reports may contain material of such a character that it may later be introduced as evidence. They may also contain rumors, opinions, and gossip which only create suspicion, but which may be useful as leads to obtaining evidence.

Thus an investigatory procedure and a method of instituting prosecutions is set up according to the familiar American pattern of investigation and prosecution of other offenses. The accused has no right to be heard at the preliminary investigating stages. He has no right to see the background information which leads to the bringing of charges against him. But if charges are brought, evidence from competent witnesses must be presented before an adverse decision can be made. Cf. *United States* v. *Grayson*, 166 F. 2d 863, 870, (CCA 2, 1948). Plainly the basis of an accusation may be any type of gossip. Conviction on the other hand in the face of a denial of the accusation must be on evidence in the record.

This interpretation is borne out by the language of the Executive Order. The secret files of investigative agencies which may be withheld are not referred to in Part IV of the Order as "evidence." Throughout the section they are called "material and information". In sharp contrast

Part V, section 1, sets up as a standard for a finding of disloyalty that it be based on "all the evidence".

(ii) As a second ground the court below argues that "if the Loyalty Boards were violating the President's instructions in so crucial a part of a program so widely publicized, he would surely have known it and would have corrected the error."

We submit that even on the court's erroneous assumption that the present case represents general practice under the Loyalty Order, this canon of construction of an Executive Order is an improper one. Under it, the correctness of an administrative interpretation would depend on the evaluation of the publicity given to it and the chances of its reaching the President's ears. If such an argument is to be considered at all we should be permitted to reply that it is our firm conviction that the President does not like the Dorothy Bailey ruling, and feels that no amendment of the Order is necessary to reinforce its clearly expressed intention. It seems plain that the President could not be expected to send private messages to quasi-judicial tribunals or to courts telling them how he wants them to construe his orders.

We submit that such conjectures on either side have no place in the judicial interpretation of an order which has all the force of a statute. The order must be construed like any other statute or order, by reference to its express language and avowed purpose.

(iii) The court below stated that "the procedure followed represented an administrative interpretation of an administrative order and the court follows such interpretations unless the error is clear." We believe it has been established that the error of the administrative body is clear by any standard. But administrative interpretations are entitled to weight only if they are in fact representative of a consistent administrative policy. See e.g., the reference to "administrative practice, consistent and generally unchallenged" in *Norwegian Nitrogen Products Co.* v. *United*

States, 288 U. S. 294, 315. As we have stated above, there was no consistent administrative interpretation of that order in the respect claimed. The procedure followed here seems to be substantially at variance with that of a great many loyalty boards at the time, and subsequent developments in practice have been in the direction of more orderly and traditional procedure.

(iv) We believe that the real reason for the court's error may be found in its analysis of the question before it. (R. 117, 118) It is clear from this discussion that the court fell into the trap which is so inviting in times of crisis, of erroneously believing that the clear dictates of justice in an individual case would prejudice the national interest. The exact language used by the the court in defining the question before it reads as follows (R. 117, 118):

> "The case presented for Miss Bailey is undoubtedly appealing. She was denied reinstatement in her former employment because Government officials found reasonable ground to believe her disloyal. She was not given a trial in any sense of the word, and she does not know who informed upon her. Thus viewed, her situation appeals powerfully to our sense of the fair and the just. But the case must be placed in context and in perspective.
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> ". . . So the question actually posed by the case is whether the President is faced with an inescapable dilemma, either to continue in Government employment a person whose loyalty he reasonably suspects or else to reveal publicly the methods by which he detects disloyalty and the names of any persons who may venture to assist him.
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> "The presentation of appellant's contentions is impressive. Each detail of the trial which she unquestionably did not get is depicted separately, in a mounting cumulation into analogies to the Dreyfus case and the Nazi judicial process. Thus, a picture of a simple black-and-white fact—that appellant did not get a trial

in the judicial sense—is drawn in bold and appealing colors. But the question is not whether she had a trial. The question is whether she should have had one.

"If the whole of this case were as appellant pictures it, if we had only to decide the question which she states and as she states it, our task would indeed be simple and attractively pleasant. But it is not so. *We are dealing with a major clash between individual and public interests. We must ascertain with precision whether individual rights are involved, and we must then weigh the sum of those rights, if there be any, against the inexorable necessities of the Government.* We must examine not only one side of the controversy but both sides." (Emphasis supplied)

We submit that no issue as defined by the court in the last paragraph above was before it. There is no clash between the "inexorable necessities of the Government" and Miss Bailey's rights. The rejection of the fantastic procedure by which Miss Bailey's career was destroyed would not impair the loyalty program. On the contrary, it would reassert and vindicate our cherished standards of fair play. It would mean that the procedures followed by the many loyalty boards which gave the "equal protection" specified in the President's order would be established as legal requirements.

More than this, assuming for argument that no constitutional question arises, all that is here involved is the question of construing an order of the President which he is at liberty to change. On this phase of the case, we are asking that the Court insist upon compliance with the President's Order, and that the Order not be annulled. If the President believes that the result is inadvisable, he can change his Order. An example of the flexibility available to him is the treatment of employees in certain "sensitive" agencies. There the Loyalty Order does not apply, (see Part VI 3 of the Order) and dismissal may be made without evidence.

The Congress has recently authorized the President to add additional departments or agencies to those where this special authority to discharge without evidence may be exercised. P. L. 733, 81st Cong. The Report by the Senate Committee on Armed Services on the bill, H. R. 7439, makes clear the distinction between cases where a clash between individual rights and the necessities of government exists and cases where it does not.

> "It will be noticed that the bill, as amended, is not designed to set aside the President's loyalty program. It is intended that his program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problem of dealing with those Federal employees who, though loyal, are so careless as to jeopardize the national security. *Disloyal persons should not be permitted to be employed in the Federal service under any circumstances. They are not entitled to Federal employment of any kind. On the other hand, it is the opinion of the committee that if the Civil Service Commission so determines, a person separated as a security risk could be placed in another Federal job where the work is of such a nature as not to be jeopardized by his employment.*" (Emphasis supplied) S. Rep. No. 2158, 81st Cong., 2d Sess.

In other words, where punishment for disloyalty is inflicted which bans the accused from all government employment and brands him as a traitor, the finding must be on all the evidence. Where security is involved employees may be discharged without evidence but not punished. And the President is given free run to designate the agencies which are sensitive. What the court below has done is to declare that all agencies are sensitive and fair trials of charges of communism cannot safely be held in any of them. It has rejected the distinction made by the Congress and the President between sensitive and non-sensitive agencies and has deprived employees in non-sensitive positions of

the protections promised them. This is improper judicial legislation.

(v) The importance of a full opportunity to face the evidence and to defend against it is emphasized by the handicaps placed upon the employee by the vague standard of "reasonable ground for belief" that the employee is "disloyal". Thus a great punishment is imposed upon employees by an adverse finding under a vague and general standard which presents of itself the greatest difficulties. Under the circumstances it is especially important, if the employee is to have any protection, that he be given the fullest opportunity to meet the specific charges against him. The President purported to grant such a right. The procedure in the present case distorts an American hearing ordered by the President to an un-American pretense. It changes a procedure, fair on its face, to one in which investigators take over the judicial function of the tribunal, evaluate the reliability of informants which the tribunal has never seen, exercise an unreviewable authority to determine what even the tribunal shall see and what it shall not see, and decide what accusations shall be disclosed to the accused and what shall be kept secret. The resulting hearing is only an inquisition operating under the cloak of a trial.

The consequences of the court's interpretation are well expressed by Judge Edgerton (R. 138):

> "However respectable her anonymous accusers may have been, if her dismissal is sustained the livelihood and reputation of any civil servant today and perhaps of any American tomorrow are at the mercy not only of an innocently mistaken informer but also of a malicious or demented one unless his defect is apparent to the agent who interviews him."

We submit that the President's promise of fair treatment to employees should be honored by the court in construing his order.

We will now consider the constitutional questions which are squarely presented only if the Court rejects our interpretation of the meaning of the Executive Order.

II.

THE DECLARATION OF INELIGIBILITY FOR GOVERNMENT EMPLOYMENT IS A PUNISHMENT WHICH HAS BEEN ILLEGALLY INFLICTED WITHOUT DUE PROCESS.

We respectfully urge this Court to take note of the fact that the action of the Loyalty Board declares the petitioner ineligible for employment in the Federal Government. This case is not a mere dismissal by the Government because of the unsuitability of the petitioner for the particular position she held. The Loyalty Board did not question her competence or ability to perform her job, nor did it consider any possible danger or disadvantage to the Government in her continuing in that job. Rather the Board was determining whether the uncorroborated secret files of a police agency disclosed any reasonable ground for doubting her loyalty to the United States. In so finding they determined that she was ineligible to hold any position however lowly or non-sensitive in the United States Government.

This is plain from the decisions of the loyalty boards. The decision of the Fourth Regional Board which was affirmed on appeal, reads as follows (R. 27):

> "As a result of such investigation and after a hearing before this Board, it was found that, on all the evidence, reasonable grounds exist for belief that Miss Bailey is disloyal to the Government of the United States.
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> "*Therefore, she has been rated ineligible for Federal employment;* she has been barred from competing in civil service examinations for a period of three years, and your office is instructed to separate her from the service." (Emphasis supplied)

The decision of the Loyalty Review Board which heard Miss Bailey's appeal (R. 63) as communicated to the Administrator of the Federal Security Agency reads as follows:

> "Please be advised that a panel of the Loyalty Review Board has duly considered the subject case on the basis of the complete file therein and has heard additional testimony by the appellant in her behalf and argument of counsel thereon. As a result, the members of the panel have reached the conclusion that the evidence in the entire record of the case is sufficient to sustain the finding of the Fourth Regional Loyalty Board that reasonable grounds exist for belief that Miss Bailey is disloyal to the Government of the United States. *The decision of ineligibility by the Fourth Regional Loyalty Board is therefore affirmed.*" (Emphasis supplied)

Plainly the basic decision was a decision that Miss Bailey was disloyal and ineligible for government employment. It was merely a necessary consequence of this conclusion that her name was stricken from all Civil Service registers (R. 26, 27); that she was barred from civil service examinations which are held for the purpose of establishing eligibility (R. 26) and that she was deprived of her existing employment on grounds of that ineligibility (R. 27).

Such a declaration of ineligibility was held by this Court in the *Lovett* case to be punishment. *U. S.* v. *Lovett,* 328 U. S. 303. It there held that a legislative rider accomplishing disbarment from government employment was invalid as a bill of attainder. For the same reason, the application of an identical sanction without a full hearing on the evidence is a violation of the due process clause. In the *Lovett* case, this Court said:

> "This permanent proscription from any opportunity to serve the Government is punishment, and of a most severe type. It is a type of punishment which Congress has only invoked for special types of odious and dangerous crimes, such as treason, . . .; acceptance

of bribes by members of Congress, . . .; or by other government officials, . . .; and interference with elections by Army and Navy officers, . . .

"Section 304, thus, clearly accomplishes the punishment of named individuals without a judicial trial."

The Court further stated:

"The fact that the punishment is inflicted through the instrumentality of an Act specifically cutting off the pay of certain named individuals found guilty of disloyalty, makes it no less galling or effective than if it had been done by an Act which designated the conduct as criminal . . . The effect was to inflict punishment without the safeguards of a judicial trial and 'determined by no previous law or fixed rule'. The Constitution declares that that cannot be done either by a state or by the United States." (328 U. S. at 316-317).

It is significant that in the *Lovett* case hearings were held before a committee which received evidence not dissimilar to the evidence on which Dorothy Bailey was convicted. The majority of the Supreme Court cited these hearings to show that the punishment of proscribing Lovett and the others from Government employment had been intended by Congress and inflicted without a judicial hearing. They stated:

"The evidence, aside from that given by the accused employees, appears to have been largely that of reports made by the Dies Committee, its investigators, and Federal Bureau of Investigation reports, the latter being treated as too confidential to be made public." 328 U. S. at 311.

The special concurring opinion of Justices Frankfurter and Reed conceded the illegality of a bar from government employment. They differ from the majority only in refusing to construe the legislative action as such a bar. The concurring judges pointed out that "No offense is specified and no declaration of guilt is made." 328 U. S. at 323. Here there is a clear finding of guilt and a sentence of ineligibility.

Both the majority and the concurring opinions in the *Lovett* case therefore compel the conclusion that President's order construed as the court below construed it is void as imposing punishment without due process of law.

Since it has been established that a determination of ineligibility for government employment is punishment of a most serious nature, it seems to us plain that the safeguards of a judicial trial as set forth in the Sixth Amendment are necessary. The views of Judge Edgerton on this score (R. 140-143) seem to us beyond question. However, even if there could be grounds for permitting such grave punishment to be imposed by an administrative official, it seems plain that the due process clause of the Fifth Amendment requires such sanctions be imposed only on evidence presented to that official with the right of confrontation, cross-examination and judicial review.

Basically, Miss Bailey's contention is that she was not given a fair trial either before a court or before an administrative agency. She was not confronted with the evidence against her and given an opportunity to meet it. We assert that the Constitution does not permit the elimination of this minimum safeguard where a finding of disloyalty and ineligibility for government employment is made. The conclusion we urge does not interfere with the security of the nation in any way. It merely protects the citizen from an unfounded blanket declaration which makes him an outcast. Where the security of the nation may be involved, Congress, as we have shown above, has made provision for discharge in sensitive agencies without evidence. But persons discharged under that authority are not branded as traitors nor are they barred from government employment for which they may be fitted. And the President has been given full authority to add agencies wherever it appears that the security of the nation makes it appropriate.

We are putting to one side cases where dismissal is made for the reason that the employee does not possess the out-

standing requirements of reliability and public confidence which may be required in a security sensitive position. We are putting to one side cases of dismissal where they are not based on a finding of disloyalty. We are dealing only with a case of employees in non-sensitive positions who are accused of disloyalty. In such cases it seems to us plain that the Constitution requires that the standards of fair hearing and due process be adhered to.

The court below recognized the principle of the *Lovett case* that ineligibility from government employment is a punishment which cannot be imposed without the safeguard of due process. It attempted to avoid the application of that principle here by reversing the declaration of ineligibility and at the same time sustaining the dismissal. It declared that " . . . the portions of the orders and directions of the defendants appellees which purported to bar Miss Bailey from federal employ for three years are invalid" (R. 122). It remanded for the entry of a decree "holding invalid those sections of the orders of the Loyalty Boards and the Federal Security Agency which would bar Miss Bailey from employment for three years, and holding valid those sections which accomplished her removal from the rolls and from office in the classified civil service." (R. 136)

We submit that this limited reversal of the Order does not accomplish what the Court apparently intended, i.e., the removal of Miss Bailey's ineligibility. Ineligibility automatically follows a finding of disloyalty. That is the basic intention of the President's Order. The loyalty boards clearly understood and correctly interpreted the Order in this respect. As Senate Report on P. L. 733 (quoted above) says:

> "Disloyal persons should not be permitted to be employed in the Federal service under any circumstance. They are not entitled to Federal employment of any kind."

This is only a reinforcement of the language of the Order. There is therefore no possible way that the Court can remove Miss Bailey's ineligibility from Federal employment without reversing the finding of disloyalty.

But even if the Court had in fact restored Miss Bailey's eligibility by reversing the finding of disloyalty its failure to restore her to her job would still have been punishment.

Any other conclusion would permit the sanction of the courts to attach to a declaredly illegal action. For of course a restoration to "eligibility" which does not erase all the consequences of the illegal declaration of ineligibility is a vain act. It does not repudiate the illegal decision of the loyalty board in the only way it can be repudiated,—by restoration to Miss Bailey of all that was taken from her by the illegal decision. It continues all the damage done by the order and removes none of it. The *Lovett* case plainly held that the bar to employment of the plaintiffs there *in the jobs they held* was illegal and they were paid for their work in those jobs. They were not merely promised a right to seek other government employment. As Judge Edgerton said (R. 141-142):

> "The distinction this court draws between dismissal as punishment and ineligibility as punishment not only contradicts the *Lovett* case but has no basis in reason. Dismissal is more certainly damaging than ineligibility, for the necessary combination of vacancies, qualifications, and desire for public appointment may never occur again. A person dismissed as disloyal can obtain no normal employment, public or private. The President's Committee on Civil Rights said in 1947: 'It is a severe punishment to be discharged from the government for disloyalty, as the Supreme Court pointed out in 1946 in *United States* v. *Lovett*. . . . Loss of job and inability to obtain another one is a severe punishment to impose on any man.' It makes no present or probable future difference to the appellant and it should make no difference to a court whether the appellant is told that she is separated from the civil

service for life, for three years, or only for the moment. Whatever she is told, if her dismissal is sustained she will not be reemployed while the present climate of opinion continues."

III.

THE ORDER ABRIDGES FREEDOM OF SPEECH AND ASSEMBLY.

Petitioner's dismissal on the vague and uncertain standards involved in a finding that reasonable grounds exist for the belief that she is disloyal abridge freedom of speech and assembly. This point has been exhaustively discussed in the opinion of Judge Edgerton (R. 143-146). We can add only that if such vague standards as set forth in the loyalty order are sustained by this Court it will add strength to a dangerous tendency. The knowledge that loyalty boards may punish unorthodoxy of thought, or even failure to agree with the opinions of the board members, has already resulted in a dangerous limitation of the freedom of speech of government employees and an impairment of the efficiency of government service. In the light of the gravity of the punishment, government employees are apt to keep silent and to avoid the company of controversial personalities. Yet in their hands has been placed the primary burden of upholding American freedom against constant attack everywhere in the world. Today more than ever, the government must be conducted by a personnel free to make policy as a result of frank interchange of diverse opinions. Presence of the vague standards of the loyalty order make it more difficult to abide by Judge Brandeis's injunction that "If we would guide by the light of reason, we must let our minds be bold." [12]

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[12] *New State Ice Co.* v. *Liebman*, 285 U. S. 262, 311.

CONCLUSION.

The judgment of the court below should be reversed with directions to remand the cause to the District Court for the entry of judgment for the plaintiff, declaring that plaintiff was improperly suspended and improperly removed from her position, that she is entitled to reinstatement to that position with back pay, and for other appropriate relief.

Respectfully submitted,

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September 20, 1950.

APPENDIX.

EXECUTIVE ORDER NO. 9835, 12 F. R. 1935.

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT.

WHEREAS each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

WHEREAS it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

WHEREAS, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

WHEREAS maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

NOW, THEREFORE, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

PART I

INVESTIGATION OF APPLICANTS

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.

b. Civil Service Commission files.

c. Military and naval intelligence files.

d. The files of any other appropriate government investigative or intelligence agency.

e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

Part II

Investigation of Employees

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than

three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally to be accompanied by counsel or representative of his own choosing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

Part III

Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Part IV

Security Measures in Investigations

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V

Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or

agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI

Miscellaneous

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE.
MARCH 21, 1947.

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 49

DOROTHY BAILEY, PETITIONER

v.

SETH W. RICHARDSON, ET AL.[1]

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR RESPONDENTS

OPINIONS BELOW

The opinion of the District Court for the District of Columbia (R. 107) is not reported. The opinion of the Court of Appeals for the District of Columbia Circuit (R. 114) is reported at 182 F. 2d 46.

[1] Respondents are the Administrator of the Federal Security Agency, the Secretary of Labor, members of the Civil Service Commission, members of a panel of its Loyalty Review Board, and members of a panel of its Fourth Regional Loyalty Board.

JURISDICTION

The judgment of the Court of Appeals was entered on March 22, 1950 (R. 147). The petition for a writ of certiorari was filed on April 19, 1950 and was granted on June 5, 1950 (R. 150). The jurisdiction of this Court is invoked under 28 U. S. C. 1254.

QUESTIONS PRESENTED

1. Whether a Government employee who has been discharged after a finding that reasonable grounds exist for belief that she is disloyal to the Government of the United States is entitled to judicial relief. This involves the questions:

(a) Whether petitioner's removal from public employment complied with the procedural requirements of Executive Order 9835.

(b) Whether Executive Order 9835 conforms with statutory restrictions upon the executive's power of removal.

(c) Whether Executive Order 9835 is unconstitutional.

EXECUTIVE ORDER INVOLVED

Executive Order 9835, 12 F. R. 1935, is set out in full in the Appendix, *infra*, pp. 119–130.

STATEMENT

Petitioner was employed in the classified civil service of the United States from August 19, 1939,[2] to June 28, 1947 (R. 4, 17, 70), when, due

[2] Petitioner was given a classified status on May 28, 1940, effective as of August 19, 1939 (R. 4, 17, 70).

to a reduction in force, she was separated from the service (R. 4, 70, 92). On March 25, 1948, she was given a temporary apointment, and on May 28, 1948, she was reinstated (R. 4, 18–19, 71), but only conditionally. The regulations of the Civil Service Commission issued under Executive Order 9830, 3 C. F. R. 108 (1947 Supp.), and in effect at the time of petitioner's reinstatement, made her reinstatement subject to the condition that removal might be ordered by the Commission if an investigation made within eighteen months disclosed disqualification for Federal employment. 5 C. F. R. § 2.112 (1949 ed.).[3] *Inter alia,* an

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[3] The Brief (p. 3) characterizes the appointment as "permanent"; but the Regulation shows that it was conditional. Section 2.112 of 5 C. F. R. (1949 ed.), states:

"(a) In the following types of appointments investigation designed to further establish the individual's qualifications may be made at any time within eighteen months of the personnel action and removal may be ordered by the Commission if such investigation discloses that the individual is disqualified for Federal employment, and all such appointments shall be considered as subject to this condition:

(1) Original probational.

(2) Reappointments.

(3) Reinstatements.

(4) Temporary appointments pending establishment of a register.

(5) Temporary appointments which exceed or are extended beyond six months.

(6) Inter-agency transfer.

(7) Conversions from excepted, war service indefinite, or temporary indefinite appointments to competitive appointments.

individual is deemed disqualified if "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (5 C. F. R. § 2.104 (7) (1949 ed.))—the standard established by Executive Order 9835, 12 F. R. 1935. During the period of her conditional reinstatement, petitioner was not in the classified Civil Service (R. 55–59, 108–109, 119–122).

An investigation of petitioner was accordingly instituted, and on July 28, 1948, the Fourth Regional Loyalty Board of the Commission sent petitioner an interrogatory to be answered under affirmation or oath within ten days after receipt, and advised her that she had the right, upon request, to a hearing before that Board. The interrogatory stated in part (R. 19–25):

> The Commission has received information to the effect that you are or have been a member of the Communist Party or the Communist Political Association; that you have attended meetings of the Communist Party, and have associated on numerous occasions with known Communist Party members.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been

"(b) The condition 'subject to investigation' shall expire automatically at the end of eighteen months from the effective date of the personnel action, except in a case in which the Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal. * * *"

> a member of the American League for Peace and Democracy, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.
>
> * * * * *
>
> The Commission has received information to the effect that you are or have been a member of the Washington Committee for Democratic Action, an organization which has been declared by the Attorney General to come within the purview of Executive Order 9835.

Petitioner answered the interrogatories under oath, admitting past membership in the American League for Peace and Democracy but specifically denying all other charges, and requested a hearing.

Pursuant to petitioner's request, a hearing before a panel of the Fourth Regional Loyalty Board was held on September 13, 1948 (R. 5, 60). At the hearing, petitioner was represented by counsel of her choice and testified personally. All affidavits offered by her were accepted, and all witnesses presented by her testified. Petitioner was specifically questioned with reference to the charges contained in the interrogatory, but the identity of the informants against her was not revealed (R. 60, 127, LB).[4]

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[4] The transcripts of hearings before the Regional Loyalty Board and the Loyalty Review Board, which have been furnished to the court in mimeographed form, shall be referred to hereafter as LB and LRB respectively.

On November 1, 1948, the Regional Board notified petitioner and her employer, the Federal Security Agency, that, on all the evidence, reasonable grounds exist for belief that she is disloyal. Petitioner was informed of her right to appeal to the Loyalty Review Board of the Commission, and the Federal Security Agency was instructed to suspend petitioner pending an appeal (R. 26–27).

At petitioner's request, a hearing was held by a panel of the Loyalty Review Board on December 8, 1948 (R. 9, 61). At this hearing, the transcript of the hearing before the Regional Board was introduced, petitioner again testified, was represented by counsel of her choice, and submitted additional affidavits in her behalf (R. 61, LRB).

On February 9, 1949, petitioner was informed by the Review Board that the decision of the Regional Board was affirmed. On the same day, notice to that effect was sent to the Federal Security Agency and the Agency was requested to remove petitioner's name from its rolls (R. 63–65). Accordingly, on February 11, 1949, petitioner was removed from her employment (R. 30–31). Thereafter, petitioner requested review of the panel's decision by the full Review Board, and on March 18, 1949, the Board declined to review its prior decision (R. 65–67).

On February 17, 1949, petitioner, in a letter to respondent Ewing, Administrator, Federal Se-

curity Agency, contended for the first time that she was in the classified Civil Service and that her removal could be effected only under the Lloyd-LaFollette Act (Act of August 24, 1912, 37 Stat. 555, 5 U. S. C. 652), *i. e.*, that the employment agency must make its own independent determination of disqualification (R. 95–96). Upon being advised by the Federal Security Agency that she had been lawfully removed (R. 97–98, 101–104), petitioner instituted the present action against respondents, individually and in their official capacities, for a declaratory judgment that she had been improperly removed, for an order directing her reinstatement, and for incidental injunctive relief (R. 2–16). Petitioner contended: (1) that her removal was not effected in accordance with the terms of the Lloyd-LaFollette Act, *supra*[46]; (2) that her removal did not comply with Executive Order 9835; and (3) that her removal was in contravention of her constitutional rights.

Petitioner's motion for an injunction *pendente lite* compelling her reinstatement (R. 31–32) was denied (R. 67–68). After respondents answered (R. 69–91), both sides moved for summary judgment and filed supporting affidavits (R. 104, 107). The District Court granted respondents' motion for summary judgment, ruling against petitioner on all three grounds. On appeal, the court below, Judge Edgerton dissenting, affirmed the judgment

[46] Petitioner has abandoned this contention. See p. 58, n. 47, *infra*.

of the District Court.[5] After holding that the Lloyd-LaFollette Act, *supra,* was not applicable to petitioner's conditional reappointment, and that the procedure followed by the Loyalty Boards conformed to the requirements of Executive Order 9835 and the Constitution, the court below stated (R. 135):

> We conclude that the Executive Order before us and the proceedings under it violated no congressional limitation upon the executive power of removal; that no constitutional right was involved in this non-appointment or dismissal; and that,

[5] In part, the district court judgment was reversed and remanded with instructions to enter a decree holding invalid that portion of the orders of respondents which barred petitioner from Federal employment for three years (R. 122, 136). The court stated that this proscription of employment was not pursuant to a general regulation. "* * * A general order that no person who is denied permanent employment after a conditional appointment be reemployed for three years might well be valid. The bar in the present proceeding appears on the record to be imposed by the Board upon this particular individual as a matter of individual adjudication. * * *" (R. 122). On April 20, 1950, the Civil Service Commission added to Part 5 of its rules, § 5.101 (a) which provides (15 F. R. 2239): "Persons disqualified for any of the reasons stated under Civil Service Rule II, § 2.104 (a) (1) through (8) of this chapter, may, in the discretion of the Commission, be denied examination, or be denied any of the types of appointment listed in Civil Service Rule II, § 2.112 (a) (1) through (6), namely, original probational, reappointment, reinstatement, temporary appointment, interagency transfer, and conversion from excepted, war service indefinite or temporary indefinite appointment to competitive appointment, for a period of not more than three years from the date of the determination of such disqualification."

in so far as the circumstances imposed hardship upon the individual, the exigencies of government in the public interest under current conditions must prevail, as they always must when a similar clash arises.

SUMMARY OF ARGUMENT

I.

This is one of the five cases now before this Court involving the validity of various aspects of Executive Order 9835, the so-called loyalty order. We have therefore thought it appropriate, before discussing the particular issues presented for decision by the present case, to furnish the Court with a general statement of the provisions of the loyalty order, of executive and legislative investigations and action preceding and following its adoption and of other international, foreign and domestic occurrences indicative of the necessity for such a program. We point out that the loyalty program was adopted after extensive executive and legislative consideration of the underlying problems over a period of at least seven years and that it has since been repeatedly approved by the Congress. We refer, *inter alia,* to disclosures in Canada and to other international and domestic events indicating that the international Communist movement, dominated and controlled by the Soviet Union, has as one of its major objectives the infiltration by its adherents of the government service of this and other coun-

tries and the use of such adherents for purposes of acts contrary to the national interests including, ultimately, the capture of all governmental power.

II

A. Turning to the particular issues presented by this case, we point out that the problem of appointment to and removal from office has always been regarded as a matter for executive discretion which is subject to judicial review only to insure compliance with applicable procedural requirements. The courts have construed Acts of Congress as limiting the inherent executive power of removal only where such a limitation was imposed by clear and express language. Where such limitation was found to exist, judicial inquiry has been restricted to the question of compliance with statutory requirements. In the absence of legislative limitations, the courts have held that appointments and dismissals presented no justiciable issue. This doctrine has been based on the reluctance of the courts to interfere with the executive in the performance of its constitutional function, and on the view that, except as Congress may otherwise provide, government employees hold office only at the pleasure of their superior.

B. These principles dispose of petitioner's contention that she was entitled to trial by jury or, at the least, to a full administrative hearing prior to dismissal. Never in our history has it been thought that a government employee could

not be dismissed without trial by jury or a *quasi* judicial administrative hearing subject to judicial review. Indeed legislative enactments restricting possible grounds of dismissal have never purported to require such a hearing. Employees have been dismissed for such offenses as acceptance of bribes, theft of government documents, and attempts at seduction by force without such a hearing. Petitioner's contention that dismissal for disloyalty is different from dismissal for other grounds is without merit. Her reliance on *United States* v. *Lovett,* 328 U. S. 303, in this connection is misplaced. The subsequent decisions of this Court in *United Public Workers* v. *Mitchell,* 330 U. S. 75, and *American Communications Commission Association* v. *Douds,* 339 U. S. 382, establish that the *Lovett* case does not prevent general regulation of the qualifications for federal office or require a judicial or *quasi*-judicial hearing in cases of dismissal for failure to conform to those qualifications.

C. Petitioner's assertion that the Executive Order invades rights guaranteed under the First Amendment is similarly without substance. Like measures have been taken in every other time of national crisis presenting issues of possible disloyalty in the federal service. Moreover, the consistent practice over much of our history has been to base appointments and dismissals to the federal service primarily on political opinions—a practice which was never thought to present any constitutional issue or other justiciable question.

Assuming, however, that a justiciable question is presented under the First Amendment we think it clear that the regulation is valid under principles announced in *United Public Workers* v. *Mitchell, supra* and *American Communications Association* v. *Douds, supra.*

III

A. Petitioner's contention that the procedure here followed was inconsistent with the terms of Executive Order 9835 is also without merit. She asserts that the use in that order of the words "hearing" and "evidence" presupposes a judicial or *quasi*-judicial hearing and that because of refusal to allow her to confront confidential informants on whose information the Board relied she was denied such a hearing. The Order, however, contemplated that in many cases decision would turn on information which considerations of national security required to be kept confidential and not disclosed to the affected employee. It accordingly provided for such disclosure as was consistent with national security. The committee whose recommendations led to promulgation of the order, and the chairman of the Loyalty Review Board charged with supervising its administration, carefully considered the question whether the right of confrontation could be granted and concluded that it could not.

B. Any suggestion that the Order is inconsistent with applicable legislation is untenable.

The Order clearly falls within the general grant of authority to the President to prescribe regulations for admission of persons into the civil service and for the conduct of persons appointed thereto. Dismissals for reasons prescribed by the Order are properly comprehended within statutory provisions permitting dismissal for such reasons as will "promote the efficiency of the service". Should there be any doubt as to this, however, it is removed by the fact that the Congress has ratified the Order by appropriating funds for its administration and by legislating in closely related fields on the assumption that the order is valid and effective.

ARGUMENT

I. PRELIMINARY STATEMENT CONCERNING EXECUTIVE ORDER 9835

This is one of five cases now pending before this Court involving aspects of Executive Order 9835. The present case and that of *Washington* v. *McGrath,* No. 229 (petition filed July 31, 1950), involve the application of those provisions of the Order which direct the refusal to hire, or the dismissal of, federal employees as to whom it is found, in accordance with procedures established by the Order, that there is reasonable doubt of loyalty to the United States. *Joint Anti-Fascist Committee* v. *McGrath,* No. 8 (certiorari granted March 13, 1950), *National Council of American-Soviet Friendship, Inc.,* v. *McGrath,* No. 7 (certiorari granted May 15, 1950), and *International*

Workers Order v. *McGrath,* No. 71 (petition filed May 11, 1950), involve the application of those provisions of the Order which call upon the Attorney General to designate, for the guidance of the Loyalty Review Board and the heads of departments and agencies in determining questions involving loyalty, those organizations which are found by the Attorney General to come within certain categories prescribed by the Order. In order that the issues in all of these cases may be seen in their proper context, we think it appropriate, preliminary to discussing the particular issues raised by the present case, to set forth a more general statement of the provisions of the Executive Order, the circumstances leading to its promulgation, and relevant events occurring subsequent thereto.

(a) *The provisions of Executive Order 9835.*— Executive Order 9835 was issued by the President on March 21, 1947 "by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the Act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States". It recites that "each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States;" that "it is of vital importance that persons employed in the

Federal service be of complete and unswerving loyalty to the United States"; that "the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes;" and that "maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government." To achieve these ends the Executive Order was promulgated "in the interest of the internal management of the Government".

Part I of the Order directs a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the government. (Section 1). The investigation may be conducted after the person enters upon actual employment but in such case his appointment is conditioned upon a favorable determination with respect to his loyalty (Section 2). Provision is made as to the sources of information to be consulted and as to the circumstances in which a full field investigation is to be conducted (Secs. 3, 4).

Part II of the Order relates to investigation and removal of existing employees. It provides that the head of each department and agency "shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment

in his department or agency" (Section 1). It directs the appointment within the department or agency of loyalty boards having the function of making recommendations with respect to removals on grounds relating to loyalty. It provides that any person charged with disloyalty shall have a right to an administrative hearing before such a loyalty board and may appear before the board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf. It further provides that written notice of such a hearing shall be given and that the employee shall be informed of the nature of the charges against him in sufficient detail to enable him to prepare his defense. "The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit." The employee is to be informed of his right to reply to such charges, and his rights to a hearing at which he may appear and present evidence (Section 2). A recommendation of removal by a loyalty board is subject to appeal to the head of the employing department or agency or persons designated by him. The decision of the department or agency head is in turn subject to appeal to the loyalty review board of the Civil Service Commission for an advisory recommendation (Section 3). The order expressly provides that these rights of hearing, notice and appeal are to be accorded to every officer or

employee "irrespective of tenure, or of manner, method, or nature of appointment" (Section 4).

Part III provides for the establishment in the Civil Service Commission of a Loyalty Review Board. The Board is authorized to review cases involving persons recommended for dismissal on grounds relating to loyalty which may be referred to it either by the employing department or agency or the officer or employee concerned, and to make advisory recommendations thereon to the head of the employing department or agency. It is also empowered to make rules and regulations relating to employee loyalty, to advise departments and agencies on loyalty problems, to coordinate their loyalty policies and procedures and to disseminate information, make reports and submit recommendations relating to the loyalty program (Section 1). An index of all persons on whom loyalty investigations have been made since September 1, 1939 is to be maintained (Section 2). The Attorney General is directed to furnish the Board with a list of organizations found by him to fall within certain categories (see p. 19, *infra*) and the Board is directed to disseminate that information to all departments and agencies (Section 3).

Part IV provides that an investigative agency shall make available on request to the head of any department or agency all information concerning any employee or prospective employee (Section 1). It further provides, however, that

> the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requested department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed [Section 2].

Part V prescribes the standards for refusal of employment or removal from employment. The controlling standard is that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States" (Section 1). As a guide in the application of this test the order specifies certain activities and associations of an applicant or employee "which may be considered in connection with the determination of disloyalty." These activities include—

> a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;
>
> b. Treason or sedition or advocacy thereof;
>
> c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States;

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

Part VI directs each department and agency to submit to the Federal Bureau of Investigation names of all its incumbent employees. The Bureau is to check such names against its records and to notify each department and agency of those persons as to whom there is substantial evidence of activities or associations coming within the categories enumerated above. Upon

receipt of such information the department or agency shall make or cause to be made such investigation of those employees as the head of the department or agency shall deem advisable (Section 1). Additional provisions are made with respect to the handling and transmission of confidential documents and information (Section 2). The Order is not to be applicable to persons summarily removed under the provisions of any statute conferring the power of summary removal (Section 3).

Following the promulgation of the Executive Order, the Civil Service Commission, on November 10, 1947, established the Loyalty Review Board and approved the appointment of its members.* The Review Board in due course adopted

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*Minute No. 1 of November 10, 1947, approved the appointment of the following 20 persons as members of the Loyalty Review Board:

Seth W. Richardson, Chairman	Earl Harrison
George W. Alger	Garrett Hoag
John Harlan Amen	Wilbur LaRoe, Jr.
Harry A. Bigelow	Arthur W. Macmahon
Aaron J. Brumbaugh	Charles E. Merriam
John Kirkland Clark	Henry Parkman
Harry Colmery	Albert M. Sames
Tom H. Davis	Charles Sawyer
Burton L. French	Murray Seasongood
Meta Glass	Henry L. Shattuck

The panel that heard petitioner's case consisted of Mr. Seth W. Richardson, Mr. Murray Seasongood, and Mr. Paul M. Hebert. Mr. Richardson is a practicing attorney of prominence in Washington, D. C., a former Assistant Attorney General and special counsel to the Congressional com-

appropriate regulations to implement the provisions of the Executive Order. Directives were issued instructing the head of each department or agency to establish a department or agency loyalty board and to prescribe procedures for the adjudication of cases within the agency, consistent with the Executive Order and the directives of the Review Board, which were to be submitted to the Review Board for its approval. 5 C. F. R. (1949 ed.) § 220.1 (a) (b). In addition, the Civil Service Commission was called upon to establish a regional loyalty board in each of its regional offices, such boards to operate procedurally under the directives of the Review Board. 5 C. F. R. (1949 ed.) § 230.1 (a) (c).[7] In accordance with the Executive Order, the Review Board provided that the jurisdiction of the department and agency boards would comprehend the cases of incumbent

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mittee to investigate Pearl Harbor. Mr. Seasongood is a practicing attorney in Cincinnati, Ohio, a former mayor of that city, and a member of this Court's Committee on the Rules of Criminal Procedure. Mr. Hebert is a professor and dean of the law school at Louisiana State University and was a member of the United States military tribunal at Nuremberg.

[7] The organization of such boards was approved by the Civil Service Commission on October 10, 1947.

The members of the Fourth Regional Loyalty Board which heard petitioner's case were Messrs. G. C. A. Anderson, Harry W. Blair and Fred E. Martin. Mr. Anderson is a practicing attorney of Baltimore, Maryland and past president of the Baltimore City Bar Association. Mr. Blair is a practicing attorney in Washington, D. C. and a former Assistant Attorney General. Mr. Martin is a practicing attorney in Norfolk, Virginia.

and excepted employees and excepted applicants and that the jurisdiction of the regional boards would extend to the cases of applicants and appointees in the competitive service, the latter term including persons, such as petitioner, who were appointed conditionally.[8] 5 C. F. R. (1949 ed.) 220.1 (a), 230.1 (a).

Pursuant to the direction of Part III of the order that the Attorney General furnish the

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[8] These terms are defined in the directives as follows (5 C. F. R. (1949 ed.) § 210.7):

"(a) *Applicant.* A person who has applied for a position in the competitive service but has not entered on duty.

(b) *Appointee.* A person who received a conditional appointment (see § 2.112 of Civil Service Commission regulations, Chapter I of this title) in the competitive service on or after October 1, 1947, in connection with which appointment the condition has not expired or been removed by Commission action. This category includes persons who receive competitive appointments by inter-agency transfer or by conversion.

(c) *Excepted applicant.* A person who has applied for a position excepted from the competitive service but has not entered on duty.

(d) *Excepted employee.* A person appointed at any time to a position excepted from the competitive service.

(e) *Incumbent employee.* (1) A person who was appointed in the competitive service prior to October 1, 1947, and who has not received, in addition, a conditional appointment on or after October 1, 1947 (see definition of appointee in paragraph (b) of this section); and (2) a person in connection with whose conditional appointment (see § 2.112 of Civil Service Commission regulations, Chapter I of this title) on or after October 1, 1947, the condition has expired or been removed by Commission action."

(Section 2.112 of the regulations of the Civil Service Commission is set forth in footnote 3, *supra*, p. 3.)

Board with lists of certain organizations, the Attorney General by letter dated November 24, 1947 (App., pp. 132–138, *infra*) transmitted to the Chairman of the Loyalty Review Board, who in turn transmitted it to the various departments and agencies, a list of some 90 organizations. The list consisted of a number of organizations which had been designated as subversive pursuant to Executive Order 9300 of February 5, 1943 (see *infra*, pp. 133–135), supplemented by a number of additional organizations. Among the latter were included the Joint Anti-Fascist Refugee Committee, the National Council of American-Soviet Friendship, Inc., and the International Workers Order, the organizations involved in Nos. 8, 7, and 71, respectively.[9] Subsequently, by memo-

[9] The letter states:

"After the issuance of Executive Order No. 9835 by the President, the Department compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations herein certified is based on their recommendations as reviewed by the Solicitor General, the Assistant Attorneys General, and the Assistant Solicitor General, and my subsequent careful study of the recommendations of all.

"In connection with the designation of these organizations I wish to reiterate, as the President has pointed out, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that membership in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. 'Guilt

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randum No. 19, dated September 21, 1948, the Chairman of the Loyalty Review Board distributed to the executive departments and agencies a list of the designated organizations classified by the Attorney General within the various categories specified in the Order. On that list the International Workers Order, the Joint Anti-Fascist Refugee Committee and the National Council of American-Soviet Friendship were all classified as Communist organizations.

(b) *Executive and legislative action preceding the adoption of the order.*—Since 1920 the world has observed the development, under the leadership of the Soviet Union, of a world-wide Communist movement openly or secretly working for the forcible overthrow of established governments in favor of proletarian dictatorships and subservient to the command of party leaders in the Soviet Union. Similarly, after 1933, a like threat of "fifth column" activities controlled and directed by Nazi Germany became apparent. It is unnecessary here to develop in detail the nature of those threats and the character of those organizations. This Court has judicially recognized the dangers presented by the Nazi fifth column. *Hirabayashi* v. *United States,* 320 U. S. 81, 96; see also e. g. *Knauer* v. *United States,*

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by association' has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide."

328 U. S. 654, 662–8. And see *Nazi Conspiracy and Aggression* (1947) Judgment of the Military International Tribunal at Nuremberg, pp. 21–38. Like recognition by this Court of the nature of the international Communist movement appears in the dissenting opinion in *Schneiderman* v. *United States,* 320 U. S. 118, 170;[10] and in the majority and concurring opinions in *American Communications Association* v. *Douds,* 339 U. S. 382. And recently the Court of Appeals for the Second Circuit, after reviewing a record made after the most extended trial, concluded that:

> The American Communist Party, of which the defendants are the controlling spirits, is a highly articulated, well contrived, far spread organization, numbering thousands of adherents, rigidly and ruthlessly disciplined, many of whom are infused with a passionate Utopian faith that is to redeem mankind. It has its Founder, its apostles, its sacred texts—perhaps even its martyrs. It seeks converts far and wide by an extensive system of schooling, demanding of all an inflexible doctrinal orthodoxy. The violent capture of all exist-

[10] It should be noted that the issue in *Schneiderman* was not whether reasonable grounds existed for an executive or legislative judgment that membership in the Communist Party in 1947 was an indication of disloyalty, but rather whether a judicial determination that membership in that party in 1927 was necessarily inconsistent with an oath to support the Constitution was founded on clear, convincing and unequivocal proof.

> ing governments is one article of the creed of that faith, which abjures the possibility of success by lawful means. * * *

United States v. *Dennis,* 183 F. 2d 201, 212 (C. A. 2).

These circumstances were a source of concern to both the Executive and Congress. Between 1930 and 1940, extensive hearings were held before Congressional committees, the testimony at which tended strongly to support the proposition that many followers of both Communism and Nazism in the United States recognized primary allegiance to the Soviet Union or to Nazi Germany, respectively, and that their activities were aimed at the destruction of our constitutional form of Government.[11] This testimony led to numerous legislative proposals.[12] In 1940 Congress enacted the Smith Act, 54 Stat. 687, 18 U. S. C. 10, 11, making it a criminal offense to advocate the overthrow of the Government by force or violence, to perform certain acts with the intention of furthering such overthrow, or to conspire to do any of the foregoing. *United*

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[11] See, e. g., House Rep. 153, 74th Cong. 1st Sess. (1935) p. 21; Hearings, House Committee to Investigate Communist Activities in the United States (1930–31), Part I, Vol. 4, pp. 384–5; Hearings, House Committee on Un-American Activities, 76th Cong., 1st Sess. (1939) Vol. 7, pp. 4308–4311, 4432, 4668–4671.

[12] See Note, 35 Col. L. Rev. 917 (1935); and see, e. g., H. R. 60, 1642, 2009, 3025, 4083, 75th Cong. (1937).

States v. *Dennis, supra.*[13] At the same session it adopted the so-called Voorhis Act, 54 Stat. 1201, 18 U. S. C. 14–17, requiring registration with the Attorney General of organizations subject to foreign control which engaged in activities having as a purpose the control by force or overthrow of the Government of the United States or any state, or which otherwise aimed at the establishment, conduct, or overthrow of the Government by force or violence. In addition, evidence presented as to the nature of Communist activities in labor unions led to the adoption, in the Labor Management Relations Act of 1947, of provisions requiring each officer of a labor union enjoying the protection of the Act to file an affidavit stating that he is not an agent of or affiliated with the Communist Party and does not believe in or support an organization that believes in or teaches the overthrow of the

[13] On June 4, 1940, only a few days before enactment of the Smith Act, Canada, by Order in Council 2363, declared the Communist Party of Canada, the Young Communist League of Canada, and other named Communist and Fascist organizations to be illegal organizations in which membership was prohibited. This order was repealed on August 16, 1945. Order in Council 5637. On September 27, 1939, nine months prior to the Smith Act, the French Government ordered the dissolution of the French Communist Party and its affiliated organizations, and prohibited the dissemination of watchwords issued by the Third Communist International. Journal Officiel of the French Republic, No. 232, September 27, 1939, p. 11770.

Government by illegal or unconstitutional methods. Section 9 of the Act of June 23, 1947, 61 Stat. 146, 29 U. S. C. (Supp. II) 141, 149; *American Communications Association* v. *Douds, supra.*

Congressional attention was also directed to the problem of Nazi and Communist infiltration into the Government service.[14] In 1939 Congress enacted in Section 9A of the Hatch Act a prohibition of the employment by the Government of any person who is a member of "any political party or organization which advocates the overthrow of our constitutional form of government." 53 Stat. 1148, 5 U. S. C. (Supp. II) 118j. In June 1940, two days prior to the passage of the Smith Act, Congress further provided in a rider to the Emergency Relief Appropriation Act of 1941, that "no alien, no Communist, and no member of any Nazi Bund Organization shall be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution." Section 15 (f) of the Act of June 26, 1940, 54 Stat. 611, 620.[15] And in 1941, Congress initiated the practice of embodying in appropriation acts riders barring the use of any of the funds appropriated for the payment of compensation

[14] See, e. g., Report of the Special Committee on Un-American Activities, H. Rep. No. 2, 76th Cong., 1st Sess., pp. 31–40, relating to Communist employees of certain projects of the Works Projects Administration.

[15] See also Act of July 1, 1941, 55 Stat. 396, 402, Act of July 2, 1942, 56 Stat. 634, 640.

to "any person who advocates, or who is a member of an organization that advocates, the overthrow of the Government by force or violence." 55 Stat. 42, 55, 75, 123, 131, 176, 197, 235, 303, 361, 394, 403, 446, 465, 497, 540, 576, 755, 837.[16]

To carry out these mandates of Congress the Civil Service Commission on June 20, 1940, issued Department Circular No. 222, in which it stated that the Commission "will not certify to any department or agency, the name of any person when it has been established that he is a member of the Communist party, The German Bund, or any other Communist, Nazi, or Fascist organization." On March 16, 1942, the Civil Service Commission, pursuant to the authority delegated to it by Executive Orders 9063 (7 F. R. 1075) and 9067 (7 F. R. 1407), adopted War Service Regulation II, Section 3 (7 F. R. 7723), which pro-

[16] See also 56 Stat. 39, 78, 120, 131, 170, 225, 245, 349, 422, 460, 506, 561, 592, 610, 632, 641, 702, 721; 57 Stat. 40, 99, 194, 216, 244, 270, 301, 346, 368, 429, 449, 493, 519, 537, 552; 58 Stat. 186, 214, 320, 333, 358, 383, 425, 462, 508, 532, 546, 572, 595, 622, 885; 59 Stat. 45, 75, 95, 130 165, 201, 221, 259, 293, 360, 383, 405, 433, 487, 657; 60 Stat. 77, 84, 167, 202, 269, 297, 408, 480, 497, 523, 564, 586, 596, 631, 700, 918; 61 Stat. 23, 80, 119, 188, 233, 278, 306, 377, 394, 447, 491, 549, 571, 584, 607, 627, 693, 703, 944; 62 Stat. 65, 192, 230, 333, 407, 422, 437, 449, 530, 558, 565, 594, 669, 1025, 1050, 1058, 1149, 1195, 1204.

Meanwhile, in June and July 1940, the Lloyd-LaFollette Act (37 Stat. 555, 5 U. S. C. 652) was amended to give the War and Navy Departments and the Coast Guard the authority to remove summarily any employee in the interests of national security. Act of June 28, 1940 and July 2, 1940, 54 Stat. 679, 713, 50 U. S. C. App. 1156. See *infra*, p. 51.

vided that an applicant may be denied appointment if there is "a reasonable doubt as to his loyalty to the Government of the United States." [17]

As to incumbent employees, the Civil Service Commission's Circular of June 20, 1940, after referring to the statutory provisions mentioned above, stated "In view of the exigencies of the times, the Commission believes that Government sideration in determining whether the removal of a particular employee will 'promote the efficiency of the service' ". Thereafter the Office of the President issued a directive calling for F. B. I. investigations of the loyalty of incumbent employees on request from the interested Government agency.[18] In June 1941, Congress appropriated $100,000 for an investigation of Government employees "who are members of subversive organizations or advocate the overthrow of the Federal Government" and directed the F. B. I. to report its finding to Congress. Act of June 28, 1941, 55 Stat. 265, 292.[19] The report made to Congress pursuant to this direction[20] clearly sets forth the practices thereupon adopted in connec-

[17] The validity of this Regulation was unsuccessfully challenged in *Friedman* v. *Schwellenbach*, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865.

[18] Set out in H. R. Doc. No. 833, 77th Cong., 2d Sess., pp. 6–7.

[19] See also Act of July 2, 1942, 56 Stat. 468, 482, appropriating $200,000.

[20] H. R. Doc. No. 833, 77th Cong., 2d Sess.

tion with loyalty investigations of incumbent employees.

The F. B. I. was authorized to institute such investigations on its own initiative and to transmit the report of the investigation to the interested agency for its determination as to what action was appropriate.[21] Inasmuch as the congressional mandate provided for the investigation of members of "subversive" organizations, it was necessary to determine which organizations should be so considered. In June 1941, the Attorney General advised the F. B. I. that the Communist Party was an organization within the congressional intent and that other organizations having Communist backgrounds or affiliations were intended to be included. The F. B. I. was requested to furnish information as to such organizations. Thereafter the German-American Bund, and seven other groups, were also designated as coming within the congressional mandate.[22] In April 1942, the Attorney General established an Interdepartmental Committee to advise the various employing agencies in the use of F. B. I. reports.[23] This Committee designated some thirty-two additional organizations which were to be considered in the investigation of charges against employees.

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[21] *Ibid.*, pp. 9–10.

[22] *Ibid.*, p. 19.

[23] The Committee comprised officials representing the Interior Department, Treasury Department, Commerce Department, Justice Department, and the Federal Deposit Insurance Corporation. *Ibid.*, p. 24.

The last-mentioned organizations were neither rated as "subversive" or "non-subversive" under the law. While membership or participation in their activities did not require dismissal under the law, it was concluded that such affiliations were clearly relevant to a broad inquiry as to fitness for public employment.[24]

On February 5, 1943, President Roosevelt issued Executive Order No. 9300 (8 F. R. 1701) replacing the Attorney General's Interdepartmental Committee with a new "Interdepartmental Committee" on employee investigations.[25] The new Committee was advisory only and was concerned with incumbent permanent employees. It confined itself to the statutory provisions of the applicable acts dealing with employee loyalty and thus deemed an employee removable on loyalty grounds only if it was established that the employee was a member of an organization advocating the overthrow of the Government or personally so advocates.[26] Pursuant to this Order the names of some 47 organizations characterized as subversive were disseminated among government agencies for use in connection with consideration of employee loyalty. (Appendix, pp. 133–135).

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[24] *Ibid.*, pp. 2, 12, 19–20, 27.

[25] This Committee comprised officials representing the Treasury Department, Interior Department, Federal Reserve Board, Federal Deposit Insurance Corporation, and the Civil Service Commission. Report of the President's Temporary Commission on Employee Loyalty (1947), p. 6, n. 5.

[26] *Ibid.*, p. 7.

On July 2, 1946, the House Committee on Civil Service (acting pursuant to H. Res. 66, 79th Cong.) created a subcommittee to inquire into the practices, procedures, and standards that were being employed in screening and investigating the loyalty of employees. The subcommittee's report,[27] submitted to the full Committee, referred to the "seriousness and magnitude of the problem" (p. 1). One of the difficulties to which it referred was the fact that:

> Very few individuals openly advocate the overthrow of our Government by force or violence or belong to organizations that so advocate. If membership exists, it is extremely difficult to prove.

After outlining and discussing shortcomings of existing procedures, the subcommittee stated its conclusion that:

> * * * it is of vital importance to our country that those employed in all departments of Federal service be of high integrity and unquestioned loyalty to our Government. Employment in the Government of the United States is and should be regarded as a high privilege. * * *
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> * * * * *
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> There are many conditions called to the committee's attention that cannot be reme-

[27] Committee on the Civil Service, House of Representatives, *Report of Investigation With Respect to Employee Loyalty and Employment Policies and Practices in the Government of the United States.* 79th Cong., 2d Sess. (1946).

> died by mere changes in techniques or by issuances of directives. Adequate protective measures must be adopted to see that persons of questioned loyalty are not permitted to enter into the Federal service. These protective measures should, of course, be absolutely fair and impartial, but doubts must, in the nature of things, be resolved in favor of the Government.

Accordingly, it recommended the creation of an Interdepartmental Committee to:

> * * * study the problems raised by this report concerning the standards, procedures, techniques, needed funds, and personnel necessary to protect this Government from disloyal employees or prospective employees and present to the Congress at the earliest time practicable and not later than the convening of the Eightieth Congress, a complete and unified program that will give adequate protection to our Government against individuals whose primary loyalty is to governments other than our own. * * *

In response to these recommendations, President Truman, on November 25, 1946, established a Temporary Commission on Employee Loyalty "to inquire into the standards, procedures, and the organizational provisions for (a) the investigation of persons who are now employed by the United States Government or are applicants for such employment, and (b) the removal or disqualification from employment of any disloyal or subversive person." Executive Order 9806, 11 F. R.

13863.[28] On the basis of information received from the intelligence services and the various Government agencies and the testimony of witnesses, the Commission reported to the President that existing security procedures in the executive branch did not furnish adequate protection against the employment or continuance in employment of disloyal or subversive employees.[29] It concluded (pp. 21, 23, 24):

> While the Commission believes that the employment of disloyal or subversive persons presents more than a speculative threat to our system of government, it is unable, based on the facts presented to it, to state with any degree of certainty how far reaching that threat is. Certainly, the recent Canadian Espionage expose,[30] the Communist Party Line activities of some of the leaders and some of the members of a government employee organization, and current disclosures of disloyal employees provide sufficient evidence to convince a fair minded person that a threat exists.
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> * * * * *
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> Although the vast majority of federal employees are loyal, some are subversive or

[28] The Commission consisted of representatives of the Departments of Justice, State, Treasury, War, and Navy, and the Civil Service Commission.

[29] Report of the President's Temporary Commission on Employee Loyalty (1947). Copies of the report were handed to appropriate members of Congress, and the report has been made generally available to the public. See, e. g., Corwin, *The President*, p. 432, n. 98.

[30] See *infra*, pp. 43–48.

disloyal. Because of the secretive manner and method of their operation, it is difficult to assess the numerical strength of the disloyal group. Whatever their number, the internal security of the government demands continuous screening, scrutiny and surveillance of present and prospective employees.

The presence within the government of *any* disloyal or subversive persons, or the attempt by *any* such persons to obtain government employment, presents a problem of such importance that it must be dealt with vigorously and effectively. [Emphasis in original.]

* * * * *

Even if all the specific recommendations contained in this report are adopted and effectuated, there is still a distinct need for aggressive and uninterrupted counter-intelligence, particularly in its counter-espionage phases. A clear example of that need is presented in the recent widely publicized Canadian experience with Communist espionage activities. It would be unrealistic to assume that foreign powers are not maintaining intelligence networks in this country.

* * * * *

The Commission accordingly submitted specific recommendations for a revitalized loyalty program and suggested that its recommendations be effectuated by the promulgation of an Executive Order which would simultaneously provide for the abrogation of Executive Order 9300 (*supra,*

p. 32).[31] On March 21, 1947, President Truman initiated the present loyalty program by the promulgation of Executive Order 9835, which incorporated most of the Commission's recommendations.[32]

Following the promulgation of the Executive Order, a bill was introduced by Representative Rees which proposed to enact into substantive law substantially all the provisions of the Order. H. R. 3813, 80th Cong., 1st Sess. The Report of the House Committee on Post Office and Civil Service (H. Rep. 616, 80th Cong., 1st Sess., pp. 2–3) stated:

> The committee believe it is of vital importance that persons employed in the Federal service shall be loyal to the United States. The committee recognize that the loyalty of the overwhelming majority of all Government employees is beyond question.

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[31] *Ibid.*, pp. 31–39.

[32] The Commission reported that between July 1, 1940, and December 31, 1946, 392,889 investigations of qualifications, character, and loyalty of applicants for employment were completed; 43,537 persons were rated ineligible; of these, there were 1,307 cases in which disloyalty was the major disqualification and others in which loyalty questions were presented although ineligibility was rested primarily on other grounds. During approximately the same period 6,193 cases of incumbent employees were referred to the F. B. I. for investigation; 101 individuals were discharged as a result of information developed during the investigations, 21 resigned while investigation was in progress, in 75 cases administrative action other than dismissal was taken, and 122 cases were still under consideration by the employing agencies. *Ibid.*, pp. 16–19.

However, the presence within the Government service of any disloyal or subversive person constitutes a continuing threat to our national security and democratic processes. * * *

The committee devoted much study to the problem of disloyalty among Federal employees and regret such legislation is necessary. However, that such legislation is required has been shown the American people in recent reports of the Royal Canadian Commission, the President's Committee on Loyalty, and the House Committee on Civil Service in the Seventy-ninth Congress. In view of these developments, and in consideration of the facts and circumstances outlined in such widely recognized and highly regarded reports, it is important that the problem be faced realistically.

The committee believe that, in order to deal with the problem effectively, legislation is necessary. The committee further believe that the subject matter involved is of such importance to the country as a whole that substantive law is required before appropriations are granted. * * *

* * * * * *

The [Civil Service] Commission * * * opposed the bill on the ground that the entire matter should be handled by Executive order, rather than by legislation. The committee disagree with this concept and have discussed above their reasons for proposing substantive law. However, it should be pointed out that the policies, objectives, and

standard of loyalty expressed in the President's loyalty order are identical with those proposed in the bill."[33]

After extensive debate (93 Cong. Rec. 8950–8979), the bill was passed by the House. The Senate Committee on Civil Service, to which the Rees Bill had been referred, postponed hearings indefinitely[34] and the bill never became law. Meanwhile, however, the Congress on July 25, 1947, appropriated $11,000,000 to provide for the administration of the Executive Order (61 Stat. 696, 700). Like appropriations were made for subsequent years.[35]

(c) *Other circumstances preceding the adoption of the order.*—This active legislative and executive concern with problems of loyalty was a reflection of contemporary diplomatic and politi-

[33] A minority of the Committee concluded (p. 9):

"We are of the opinion that disloyal or subversive personnel can best be routed out of the Government services by the vigorous application of Executive Order 9835 * * *. It is, we believe, an intelligent approach to the problem and is in much better accord with good administration than H. R. 3813."

In this connection the minority stated that it was "impressed" by the work of the President's Commission (*supra*, pp. 34–36) and that the Commission's findings, conclusions, and recommendations "have great weight." (*Ibid.*)

[34] New York Times, July 25, 1947, p. 9, col. 2.

[35] For the following fiscal year, the appropriation was $6,606,000. 62 Stat. 179. See Report of the Investigations Subcommittee on Expenditures, Investigation of Federal Employees Loyalty Program, S. Rep. No. 1775, 80th Cong., 2d sess., p. 5. See also Public Law No. 266, 81st Cong., 1st sess.

cal events. During World War II, the most obvious problem of disloyalty was that presented by Nazi, Fascist and pro-Japanese individuals and organizations—a fact reflected in the number of such organizations listed pursuant to Executive Order 9300. Russia, although at first facilitating German aggression westward by the signature of the Nazi-Soviet pact of August 23, 1939,[36] had become our active ally in the war. Within a short time after the termination of the war, however, it became apparent that the Soviet Union was bent upon a policy of expansion by legal or illegal means. During and immediately following the military collapse of Nazi Germany, Russian troops had occupied Poland, Czechoslovakia, Hungary, Bulgaria and Rumania. In each of these countries, new governments were established, consisting of a coalition in which the

[36] See Nazi-Soviet Relations, 1939 to 1941 (Department of State, 1948), pp. 70–76. It may be noted that after the conclusion of this pact and prior to the German invasion of Russia, Russia engaged in acts of international aggression which this Government forthrightly condemned as such. Thus the Russian attack on Finland beginning in November 1939 was condemned by the President as a "wanton disregard for law". 1 Dept. of State Bulletin 609. See also 2 Dept. of State Bulletin 295. The United States likewise vigorously condemned the occupation of Latvia, Lithuania and Estonia in June, 1940 (see statement of Acting Secretary of State Welles, July 23, 1940, 3 Department of State Bulletin (1940) p. 48), and has since adhered to a policy of non-recognition of the Soviet regimes in those countries. See Langer, *Seizure of Territory* (1947), p. 264, note 32.

Communists were a minority party. In each there ensued a gradual assumption of complete political power by the Communists, based generally on the acquisition of control of the police and other government agencies and the oppressive use of the police and of Soviet military forces. The ultimate outcome was the complete acquisition of control by the Communists, with opposition leaders being executed, imprisoned, escaping or simply disappearing. These events were accompanied by repeated protests from the United States.[37]

In the United Nations a rift had been developing between the Western democracies and the Soviet Union and its satellites. The Soviet Union was progressively abstaining from participation in various activities and committees of the United Nations. In the Security Council moreover, it became apparent that its policy was one of obstructionism, relying upon every possible

[37] These events and the protests of the United States concerning them are set forth in the following:

Poland—15 State Dept. Bull. 422; 16 State Dept. Bull. 299.

Rumania—15 State Dept. Bull. 1057; 17 State Dept. Bull. 38, 329, 995; 18 State Dept. Bull. 216; 20 State Dept. Bull. 450, 692, 755.

Hungary—16 State Dept. Bull. 495, 583, 1215; 17 State Dept. Bull. 392, 411; 20 State Dept. Bull. 450, 556, 692, 697, 755.

Bulgaria—16 State Dept. Bull. 1218; 17 State Dept. Bull. 429, 481, 531, 702; 19 State Dept. Bull. 447, 710; 20 State Dept. Bull. 450, 556, 692, 755.

Czechoslovakia—18 State Dept. Bull. 304, 446, 536.

tactic including vituperation and excessive use of the veto power.[38]

Meanwhile, within the United States the Communist Party underwent a reorganization and change of policy which reflected the changes in American-Soviet relations. In 1943 the Communist International (Comintern), the nerve center of the international Communist revolutionary movement, had been formally dissolved. (New York Times, June 11, 1943, p. 3, col. 7.) On January 7–9, 1944, Earl Browder, the General Secretary of the Communist Party of the United States, set forth a program for dissolving that party and abandoning the concept of class war within the United States. (Daily Worker, January 16, 1944, Magazine Section, pp. 7, 8, 9, 10, 12.) This program was adopted by a convention of the Communist Party on May 20, 1944, the party was dissolved and a new Communist Political Association created. (*The Path to Peace, Progress and Prosperity,* Proceedings of the Constitutional Convention of the Communist Political Association 1944 (p. 144).) Within a few days after the unconditional surrender of Germany on May 8, 1945, however, steps were taken to reconstitute the Communist Party. In April, 1945, an article had been published by Jacques Duclos, General Secretary

[38] The recent Soviet veto of a resolution condemning the North Korean authorities for refusal to withdraw behind the 38th parallel was the 44th veto cast by the Soviet Union. (N. Y. Times, Sept. 7, 1950, p. 1, col. 5.)

of the French Communist Party, in Cahiers du Communisme (an official French Communist periodical), which condemned the Browder program as a gross departure from Communist principles. That article was reprinted in the Daily Worker on May 24, pp. 7, 8, 9. On June 2, the national board of the Communist political association adopted a draft resolution in effect approving the position taken by Duclos, and calling for action to "overcome our errors and mistakes". (Daily Worker, June 4, 1945, pp. 4, 5.) On July 26–28, members of the Communist Political Association met in a special national convention at which it was voted to reconstitute the Communist Party. A constitution calling for the establishment of a dictatorship of the proletariat in the United States was adopted. (Daily Worker, July 30, 1945, p. 2.) Browder was reduced to the ranks and shortly thereafter expelled. Thus, the Communist Party openly returned to a policy of class warfare aimed at establishing by force and violence within the United States a dictatorship of the proletariat.

That the activities of the Communist Party involved not only working toward violent revolution and capture by any means of the instrumentalities of government but also the conduct of organized espionage on behalf of the Soviet Union was clearly shown by disclosures made in Canada in 1945. In September of that year, Igor Gouzenko, a cypher clerk on the staff of the mili-

tary attache of the Soviet Embassy at Ottawa, made available to the Canadian authorities a number of documents from that office together with his explanatory testimony. An exhaustive inquiry was made by a specially appointed royal commission composed of two judges of the Supreme Court of Canada. The report of that Commission [39] revealed the evidence of a well-organized espionage network, conducted under the supervision of the military attache, and engaged in transmitting classified information to the Soviet Union. Nineteen agents were identified (p. 85), including a member of parliament and officers or employees of numerous government agencies or government-supervised research organizations (pp. 57, 111). In addition Gouzenko testified that there were parallel espionage networks operating under other officers of the Embassy and that "there are other societies and other people working under every Embassy, under every Consul in each place where there is a Consulate" (p. 19). The investigation also disclosed links between the Canadian network and parallel organizations in other countries including Great Britain and the United States (pp. 31–35). The Commission further concluded that the Comintern, although ostensibly dissolved, continued to

[39] Report of the Canadian Royal Commission to investigate the facts relating to and the circumstances surrounding the communication, by public officials and other persons in positions of trust, of secret and confidential information to agents of a foreign power, June 27, 1946.

"exist and to function secretly" (p. 37). The following excerpts from the report are revealing:

COMMUNIST PARTY—THE MAIN RECRUITING BASE

It became manifest at an early stage of this Inquiry, and has been overwhelmingly established by the evidence throughout, that the Communist movement was the principal base within which the espionage network was recruited; and that it not only supplied personnel with adequately "developed" motivation, but provided the organizational framework wherein recruiting could be and was carried out safely and efficiently.

In every instance but one, Zabotin's Canadian espionage agents were shown to be members of or sympathisers with the Communist Party. The exception was Emma Woikin, who was not, so far as the evidence discloses, of the above class. Her motivation was a sympathy with the Soviet regime based, as she said, on "what I have read."

Because of the emergence of this fact, it was necessary for us to ascertain where each of the persons whose conduct was being investigated stood with regard to Communist ideology and Communist associations.

Zabotin found already in existence in Ottawa, Montreal and Toronto numerous study groups where Communist philosophy and techniques were studied and where

writings of Marx, Engels, Lenin and later authors were read and discussed. To outsiders these groups adopted various disguises, such as social gatherings, music-listening groups and groups for discussing international politics and economics. In some at least of these groups dues were collected and the money used for various purposes including assistance to Communist Party leaders, and the purchase of Communist literature.

These study groups were in fact "cells" and were the recruiting centres for agents, and the medium of development of the necessary frame of mind which was a preliminary condition to eventual service of the Soviet Union in a more practical way [p. 44].

* * * * *

An inevitable result of this emphasis on a conspiratorial atmosphere and behaviour even in political discussions, correspondence, and meetings which are in themselves perfectly legal and indeed are the cherished right of everyone in a democratic society, would seem to be the gradual disintegration of normal moral principles such as frankness, honesty, integrity, and a respect for the sanctity of oaths.

We believe that this technique played a definite part in bringing persons such as Miss Willsher, Mazerall, Lunan, and others to a state of mind where they could disregard the moral obligations which they

had undertaken in connection with their public duties.

A reading of the evidence before us, taken as a whole, indicates also that this technique seems calculated to affect gradually and unconsciously the secret adherent's attitude towards Canada. Often some of the agents seem to have begun their Communist associations through a burning desire to reform and improve Canadian society according to their lights. But one effect of prolonged habituation to conspiratorial methods and the conditions of secrecy in which these people work is to isolate them from the great mass of the Canadian people [p. 72].

* * * * *

Thus it seems to happen that through these study-groups some adherents, who begin by feeling that Canadian society is not democratic or not equalitarian enough for their taste, are gradually led to transfer a part or most of their loyalties to another country, apparently without reference to whether that other country is in actual fact more or less democratic or equalitarian than Canada.

Indeed, a sense of internationalism seems in many cases to play a definite role in one stage of the courses. In these cases the Canadian sympathiser is first encouraged to develop a sense of loyalty, not directly to a foreign state, but to what he conceives to be an international ideal. This subjec-

> tive internationalism is then usually linked almost inextricably through the indoctrination courses and the intensive exposure to the propaganda of a particular foreign state, with the current conception of the national interests of that foreign state and with the current doctrines and policies of Communist Parties throughout the world [p. 73].

In summary, the Commission stated that "Membership in Communist organizations or a sympathy toward Communist ideologies was the primary force which caused these agents to do the acts referred to in their individual cases" (p. 686). The Commission's investigation led to criminal prosecutions, resulting in the conviction of eleven persons.[40]

(d) *Events since the issuance of the Executive Order.*—Events since the issuance of the Executive Order have greatly intensified the indications of the dangers to be feared from organized Communist groups. The progressive worsening of international relations between the United States and the Soviet Union hardly needs elaboration; a mere mention of the Berlin air lift and

[40] The legal proceedings against these persons are reflected to some extent in *Rex* v. *Mazerall*, [1946] 4 D. L. R. 791, O. R. 762; *Rex* v. *Lunan*, 3 D. L. R. 710, O. R. 201; *Rex* v. *Harris*, [1947] O. R. 461; *Rex* v. *Smith*, [1947] O. R. 378; *Rex* v. *Gerson* [1947] O. R. 715, all decisions of the Court of Appeals of Ontario, and in *Rose* v. *The King*, [1947] 3 D. L. R. 618, 88 Can. C. C. 114, and *Boyer* v. *The King*, [1949] 94 Can. C. C. 195.

the Korean War is sufficient. The nature and purposes of the American Communist Party have likewise become more apparent as a result of the extended trial of eleven leaders of the Party in New York for a conspiracy to overthrow the Government of the United States by force and violence in violation of the Smith Act, a trial which resulted in conviction by a jury and unanimous affirmance of that conviction by the Court of Appeals for the Second Circuit, *United States* v. *Dennis,* 183 F. 2d 201. Meanwhile legislative and executive investigations were producing disclosures duplicating those of the Canadian Royal Commission. As a result of investigation by the Department of Justice, Judith Coplon, an employee of that Department, was tried and convicted of espionage, the proof disclosing delivery by her to a Soviet official of confidential government documents. (New York Times, July 1, 1949, p. 1, col. 1; March 8, 1950, p. 1, col. 6.) In March 1950, the English scientist Klaus Fuchs confessed to espionage of the gravest character against the United States and the United Kingdom on behalf of the Soviet Union. (New York Times, March 2, 1950, p. 1, col. 1.) Fuchs' confession led to active investigations by the executive which resulted in the indictment of a number of persons in this country on charges of complicity in the disclosure to the Soviet Union of highly secret information relating to atomic energy. Two of

the defendants, Harry Gold and Alfred Dean Slack, have pleaded guilty. (New York Times, July 21, 1950, p. 8, col. 3; Washington Post, September 19, 1950, p. 3.)

Meanwhile legislative hearings continued to be held. Whittaker Chambers testified before the House Committee on Un-American Activities that he had been a member of the Communist Party of the United States and, *inter alia,* that during the period of his membership he had acted as an espionage courier in obtaining for agents of the Soviet Union classified State Department documents from Alger Hiss and Julian Wadleigh, both of whom were employees of the State Department. Confronted with this testimony, Wadleigh refused to answer questions before the Committee on the ground of possible self-incrimination,[41] while Hiss, after contradicting Chambers, was convicted of perjury.[42] At the trial of Hiss, Wadleigh admitted delivering classified State Department documents to Chambers and to another "courier."[43] Recently Lee Pressman, also identified by Chambers as a member of a Communist cell while employed by the Department of Agriculture, admitted to a Committee of Congress that he had been so. He identified three other members of that cell, all of whom refused to

[41] Hearings before House Committee on Un-American Activities Regarding Communist Espionage in the United States Government (1948), pp. 1429–1449.

[42] New York Times, January 22, 1950, p. 1, col. 8.

[43] New York Times, July 17, 1949, pp. 1, 3.

testify on grounds that their answers might incriminate them (New York Times, August 28, 29, 1950, p. 1, col. 1; September 2, p. 6, col. 1).

Paced by these events and disclosures Congressional interest in the problem of employee loyalty continued to be most active. The principal legislative development was the supplementing of the loyalty program by additional authority to remove employees who, although not found to be disloyal, were deemed bad security risks. In 1940, the power of dismissal in the national interest had been granted the War and Navy Departments and the Coast Guard (*see supra*, p. 29, note 16). In 1946 similar authority was extended to the State Department by a rider to the Appropriation Act which provided that the Secretary of State "may, in his absolute discretion * * * terminate the employment of any officer or employee * * * whenever he shall deem such termination necessary or advisable in the interests of the United States." Act of July 5, 1946, 60 Stat. 458.[a] Like authority was given the Atomic Energy Commission in 1946, Act of August 1, 1946, 60 Stat. 771, and the Central Intelligence Agency in 1947, Act of July 26, 1947, 61 Stat. 498.

Notwithstanding these broad authorizations, charges were made that disloyal employees re-

[a] Extended by the Act of July 9, 1947, 61 Stat. 288, to June 30, 1948; further extended by the Act of June 3, 1948, 62 Stat. 315–316, to June 30, 1949; to June 30, 1950, by P. L. 179, 1st Cong., 1st sess; to June 30, 1951 by P. L. 759, 81st Cong., 2d sess.

mained in the Government. For example, in February of 1950 a subcommittee of the Senate Foreign Relations Committee was authorized "to conduct a full and complete study and investigation as to whether persons who are disloyal to the United States are or have been employed by the Department of State" (Senate Res. 231, 81st Cong., 2d Sess.). In accordance with this resolution, the Tydings Committee conducted an extensive investigation of the operation of the loyalty program within the State Department. Its report discusses in considerable detail the procedures adopted by that Department for determining whether employees should be discharged as disloyal pursuant to Executive Order 9835 or as bad security risks pursuant to the legislation referred to above (Sen. Rep. 2108, 81st Cong., 2nd Sess., pp. 12–25). Although concluding that the particular charges of disloyalty that had prompted the investigation were unfounded, it expressed emphatic approval of the loyalty program and raised the question whether that program should not be extended. The report stated (p. 12):

> Our review of the files reveals to us the value and necessity of the loyalty program, not only as a means of protecting the security of the Federal service but also, where such is the case, to protect loyal employees who have been the subject of unfair and malicious reports for ulterior motives. We fully endorse the program

> and feel that the necessity for perennial vigilance to prevent the penetration of our Government by those who would subvert and destroy it is of paramount importance. We must expect that our enemies will seek to penetrate every phase of our national life and that the Federal service is and will continue to be a prime target.

The Committee recommended "a thorough and comprehensive study of the loyalty program throughout the Federal service with a view to determining its adequacy to meet the requirements of security at this critical juncture of our international relations" (p. 168), and suggested that consideration be given the question "whether the security-risk standard now utilized by the State Department as a result of the so-called McCarran rider should be adopted in addition to the loyalty standard incident to the over-all administration of the loyalty program throughout the Government service" (p. 168).[45]

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[45] As of May 31, 1950, investigations conducted under the Executive Order had resulted in the dismissal of 225 employees. Agency loyalty boards had received a total of 12,272 cases. Of that number, 1,464 cases were closed because the employee left the Government service during investigation and 1,068 cases were closed because the employee resigned prior to the adjudication of his case. Of the 8,026 cases adjudicated by the Agency Boards, 468 determinations of ineligibility were made. As a result of appeal to the Loyalty Review Board 225 persons were dismissed and 151 restored to their positions. 86 cases were in process of appeal or pending removal and 16 cases had been remanded for addi-

By the Act of August 26, 1950 (Pub. Law 733, 81st Cong., 2nd sess.) Congress further extended the authority to dismiss persons deemed bad security risks. That Act authorizes the termination of employment of any employee by the appropriate department or agency head when it is determined that such termination is "necessary or advisable in the interest of the national security of the United States." The Committee Reports accompanying it again disclose unqualified Congressional approval of the loyalty program and indicate that the power of dismissal "in the interest of the national security" was intended to supplement that program. Thus the House Report states (H. Rep. No. 2330, 81st Cong., 2d Sess., p. 4):

> The bill does not deal with the suspension or removal of disloyal Federal employees. Executive Order 9835 of March 21, 1947, establishes procedures under which employees who are found to be disloyal are removed from the Federal Government. This bill is concerned with the all-important problem of dealing with those Federal employees who, although loyal to the United States, act in a manner which jeopardizes national security, either through wanton carelessness or general disregard for the public good.

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tional evidence. See United States Civil Service Commission, Loyalty Review Board, *Report on the Loyalty Program as of May 31, 1950 (June 23, 1950)*.

The Senate Report similarly states (S. Rep. No. 2158, 81st Cong., 2d Sess., p. 2):

> It will be noticed that the bill, as amended, is not designed to set aside the President's loyalty program. It is intended that his program will be continued. Executive Order 9835 of March 21, 1947, established procedures under which employees found to be disloyal, as distinct from poor security risks, could be removed from the Federal Government. This bill is concerned primarily with the problem of dealing with those Federal employees who, although loyal, are so careless as to jeopardize the national security.

Very recently the Congress enacted over the President's veto the Internal Security Act of 1950, Pub. L. 831, Sept. 23, 1950. The Act recites detailed findings of the Congress as to the nature and objectives of the World Communist movement (Secs. 2, 101). It provides, *inter alia*, for the registration of "Communist-Action Organizations" and "Communist-Front Organizations" (Secs. 7–15) and makes it unlawful for any member of an organization of either class to "hold any nonelective office or employment under the United States" (Sec. 5 (a) (1) (B)).[46]

[46] The measures taken by the British government with relation to disloyalty in the public service have been thus summarized by the Lord Chancellor (Parliamentary Debates (Hansard), House of Lords Official Report, Vol. 166, No. 10 (March 29, 1950)):

II

PETITIONER'S CONTENTIONS AS TO THE UNCONSTITUTIONALITY OF EXECUTIVE ORDER 9835 CANNOT PREVAIL

Having indicated the general background in which this and the companion cases arose we turn

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"* * * We do not seek to proscribe opinions, but we do lay down rules for public offices. The principle we adopt is to ensure that no civil servant, industrial or non-industrial, who is known to be a member of the Communist or Fascist Parties, or to be associated with them in such a way as to raise legitimate doubts about his or her reliability, is employed in connection with work the nature of which is vital to the security of the State. We have found before now that these men do regard some other loyalty—for reasons which are not apparent to me—as superior to the loyalty which they owe to their country.

"Each Minister is responsible for classifying the work of his Department as "Secret" or "Non-secret." I cannot tell your Lordships about the methods employed to detect Communists—and this applies equally to Fascists—but the procedure is that individuals are from time to time notified to the Minister concerned as being suspected Communists or Fascists, and the Minister then looks into the matter and sees whether there is a *prima facie* case. If he thinks there is a *prima facie* case he gives the individual all the information he can, consistent with security requirements; and then the suspect is suspended from duty and sent on special leave with pay. If he admits the charge, then we try to find him suitable employment on non-secret work, either in that Department or in some other, and if no such employment can be found he is dismissed. If he denies the charge he has a right to go before three Advisers who decide whether or not the charge is substantiated. They report to the Minister, who may receive or reject their findings—that, of course, is entirely his responsibility."

For collections of state statutes dealing with Nazism and Communism in the public service, and generally, see Chafee, *Free Speech in the United States* (1941) Appendix III;

to the specific issues presented by the present case. Petitioner asserts that the procedure followed by the loyalty boards was in conflict with the Executive Order, that the Order violates rights to procedural due process and trial by jury guaranteed by the Fifth and Sixth Amendments and that it violates rights of free speech and assembly guaranteed by the First Amendment. Reversing the order in which she has presented these contentions, we shall discuss first her constitutional objections to the loyalty program as a whole, and shall consider in Part III of this brief her contention that the particular proceedings followed below were in conflict with requirements of the Executive Order.

Although petitioner seeks to raise a broad range of constitutional issues, we believe that the issues actually presented for adjudication are narrowly circumscribed. That this is so is apparent from the nature of the action which petitioner has brought and the traditional pattern of judicial consideration of similar actions. By her action, petitioner seeks a declaratory judgment, that she was illegally discharged, and an order for her

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Groner, *State Control of Subversive Activities in the United States*, 9 Fed. Bar Journal 61 (1947); 96 U. of Pa. L. R. 381; *1949 Annual Report of the House Committee on Un-American Activities*, H. Rep. 1950, 81st Cong., 2d Sess., Appendix I. See also *L'Hommedieu* v. *Board of Regents*, 95 N. Y. S. 2d 114 (3d Dept.); *Lederman* v. *Board of Education*, 95 N. Y. S. 2d 466 (2d Dept.).

reinstatement."[47] The proceeding which she brought is basically simple in character and its disposition is controlled by the familiar principle, established in countless cases involving removal of federal officers or employees, that such a removal is an executive act over which the courts have no general revisory power."[48] Since " 'the judicial Power' with which alone this Court is invested comes into operation only as to issues that the long tradition of our history has made appropriate for disposition by judges" (Frankfurter J., concurring

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[47] As the court below rightly held (R. 119–122) petitioner, as one employed subject to condition, has the status of an applicant for employment rather than that of a discharged employee. Petitioner has not petitioned for review of that holding. That circumstance casts grave doubt on her standing to raise any of the contentions she advances. Cf. *Friedmann* v. *Schwellenbach*, cited *supra*, p. 30, n. 17. However, since another case now pending before this Court (*Washington* v. *McGrath*, No. 229) does present the issue of discharged incumbent employees, we have thought it preferable to cast our argument here in broader terms. In the event that this Court should reject the broad argument here advanced, it would become necessary for it to consider the standing of a prospective employee to obtain relief.

[48] The prior actions were generally suits for damages or for salaries. The fact that the present action is brought under the Declaratory Judgment Act, however, cannot serve to extend the substantive scope of the judicial power to review executive action in the field of removal from office. See *United Public Workers* v. *Mitchell*, 330 U. S. 75; *Federation of Labor* v. *McAdory*, 325 U. S. 450, 461; *Colegrove* v. *Green*, 328 U. S. 549, 551–552; *Coffman* v. *Breeze Corps.*, 323 U. S. 316, 324; *Aetna Life Ins. Co.* v. *Haworth*, 300 U. S. 227, 240; *United States* v. *West Virginia*, 295 U. S. 463, 475; *Nashville, C. & St. L. Ry. Co.* v. *Wallace*, 288 U. S. 249, 262.

in *American Communications Assn.* v. *Douds,* 339 U. S. 382, 416) we turn first to a consideration of the traditional scope of judicial action in this field.

A. *The appointment and removal of Government employees is a matter of executive discretion which is subject to judicial review only for compliance with applicable statutes or regulations.* From the beginning of our constitutional history, it has been settled that questions of tenure of office are basically not judicial questions, except as Congress may impose statutory requirements which become judicially enforcible. Responsibility for the quality of government officers and employees is vested by the Constitution in the executive and legislative branches. Art. II, Secs. 2, 3. In particular, it has been settled since the debates in the first Congress that the President has an inherent power of removal, derived from the nature of his executive office, which is unrestricted except as Congress, in the exercise of its power to provide for the appointment of inferior federal officers (Constitution, Art. II, Sec. 2), may validly limit it by general legislation. *Myers* v. *United States,* 272 U. S. 52. The fundamental nature of that power, and the extreme reluctance of the courts to permit any restriction on it, are illustrated by the cases involving the validity and extent of attempted legislative regulations. While it is established that Congress has some power to regulate the terms and conditions of employment of inferior federal

officers (*United States* v. *Perkins*, 116 U. S. 483), the courts in construing and applying such legislation have repeatedly stressed the importance of preserving the executive prerogative unimpaired, and have insisted that that prerogative can be limited, if at all, only by the most express language. Thus, for example in *Parsons* v. *United States*, 167 U. S. 324, a statutory provision of a four year term of office was held not to oust the President's power of removal before the end of that term. In *Shurtleff* v. *United States*, 189 U. S. 311, a statutory provision for removal from office for inefficiency, negligence of duty or malfeasance in office was held not to preclude a removal without notice or hearing and for no assigned cause. Finally, in *Myers* v. *United States*, 272 U. S. 52, this Court, while recognizing the power of Congress to regulate removals of departmental employees, held that Congress was without constitutional power to limit the President's "unrestricted power of removal" (272 U. S. 176) of officers appointed by the President with the consent of the Senate."[49]

These cases deal with conflicts between the legislative and the executive over the removal power—a problem not presented here for, as we shall show in Part III of this Brief, not only is

[49] The limitations placed on this decision by *Humphrey's Executor* v. *United States*, 295 U. S. 602 with respect to legislative power over independent regulatory commissions are irrelevent for present purposes.

there no inconsistency between the executive order and any act of Congress, but Congress has in effect ratified the order. They are significant, however, as demonstrating clearly the scope of the inherent executive power of removal and the reluctance of the courts to countenance interference with that power.

In the absence of legislative restraint upon the executive's discretionary power to remove inferior government officers and employees, the courts have consistently refused, since the founding of the Republic, to supervise the action of executive officials. Where Congress has specified the grounds of removal and prescribed certain procedures, the function of the judiciary has been held to be exhausted upon a determination that the mandate of Congress is constitutional and has been complied with. At no time have the courts intervened to review the basis for executive action or to substitute their judgment for that of the officials. *Eberlein* v. *United States,* 257 U. S. 82; *Burnap* v. *United States,* 252 U. S. 512; *Brown* v. *Lane,* 232 U. S. 598; *Reagan* v. *United States,* 182 U. S. 419; *Keim* v. *United States,* 177 U. S. 290; *White* v. *Berry,* 171 U. S. 366; *Crenshaw* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Matter of Hennen,* 13 Peters 230; *United States* v. *Guthrie,* 17 How. 284.[50]

[50] See also *Carter* v. *Forrestal,* 175 F. 2d 364 (C. A. D. C.); *Levy* v. *Woods,* 171 F. 2d 145 (C. A. D. C.); *Friedman* v.

Such non-intervention in the field of personnel administration is, of course, merely one application of the long-recognized principle that "the interference of the courts with the performance of the ordinary duties of the executive departments of the government, would be productive of nothing but mischief; and * * * that such a power was never intended to be given to them." *Decatur* v. *Paulding*, 14 Pet. 497, 516.[21] The exec-

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Schwellenbach, 159 F. 2d 22 (C. A. D. C.), certiorari denied, 330 U. S. 838, rehearing denied, 331 U. S. 865; *Siskind* v. *Morgenthau*, 152 F. 2d 286 (C. A. D. C.); *Maghan* v. *Board of Commissioners of the District of Columbia*, 141 F. 2d 274 (C. A. D. C.); *Hammond* v. *Hull*, 131 F. 2d 23 (C. A. D. C.), certiorari denied, 318 U. S. 777; *Levine* v. *Farley*, 107 F. 2d 186 (C. A. D. C.), certiorari denied, 308 U. S. 622; *United States ex rel. Palmer* v. *Lamp*, 244 Fed. 377 (C. A. 6); *United States ex rel. Anderson* v. *Simon*, 269 Fed. 715 (C. A. D. C.); *United States ex rel. Nalle* v. *Hoover*, 31 App. D. C. 311; *United States ex rel. Taylor* v. *Taft*, 24 App. D. C. 95, writ of error dismissed, 203 U. S. 461; *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Asher* v. *Forrestal*, 71 F. Supp. 470 (D. D. C.); *Waterman* v. *Somervell*, 34 F. Supp. 695 (S. D. N. Y.), certiorari denied, 317 U. S. 630, rehearing denied, 317 U. S. 710, 318 U. S. 798, 320 U. S. 214; *Block* v. *Sassaman*, 26 F. Supp. 105 (D. Minn.); *Gadsden* v. *United States*, 111 C. Cls. 487; *Weinstein* v. *United States*, 109 C. Cls. 579; *Culligan* v. *United States*, 107 C. Cls. 222, certiorari denied, 330 U. S. 848; *Kent* v. *United States*, 105 C. Cls. 280; *Bratton* v. *United States*, 90 C. Cls. 604; *Bennett* v. *United States*, 89 C. Cls. 322; *Golding* v. *United States*, 78 C. Cls. 682, certiorari denied, 292 U. S. 643; *Kellom* v. *United States*, 55 C. Cls. 174; *Lellmann* v. *United States*, 37 C. Cls. 128.

[21] See also *Gaines* v. *Thompson*, 7 Wall. 347; *Litchfield* v. *Register and Receiver*, 9 Wall. 575, 577; *Carrick* v. *Lamar*,

utive and legislative branches of the Government are constitutionally responsible for the ability, integrity and loyalty of the personnel of the executive branch. That responsibility of necessity comprehends the power to remove those not qualified. No function is more internal to the executive branch than the selection and retention or dismissal of its employees.[22] As the court below succinctly observed, "the judiciary cannot assume responsibility for the sufficiency of the qualifica-

116 U. S. 423, 426; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *West* v. *Hitchcock*, 205 U. S. 80, 85; *Ness* v. *Fisher*, 223 U. S. 683, 691–692; *Alaska Smokeless Coal Co.* v. *Lane*, 250 U. S. 549, 555; *Hall* v. *Payne*, 254 U. S. 343, 347; *Work* v. *Rives*, 267 U. S. 175, 183; *Wilbur* v. *United States*, 281 U. S. 206, 218; *I. C. C.* v. *New York, N. H. & H. R. Co.*, 287 U. S. 178, 203; *United States ex rel. Chicago Gt. Western R. R.* v. *I. C. C.*, 294 U. S. 50, 62; *United States ex rel. Girard Co.* v. *Helvering*, 301 U. S. 540, 543; *Adams* v. *Nagle*, 303 U. S. 532, 542; *Perkins* v. *Lukens Steel Co.*, 310 U. S. 113, 131–132; *United States Graphite Co.* v. *Sawyer*, 176 F. 2d 868 (C. A. D. C.), certiorari denied, 339 U. S. 904.

[22] "The framers of our Constitution had one essential feature of efficient government clearly in mind. They gave to the Executive officer charged in law with the responsibility and actually charged by the people with the responsibility of carrying on the Executive department of the government, the power and means of meeting that responsibility. They vested in him complete power to appoint all the officers of the governent who were subordinate to him, and upon whose political capacity and governmental discretion would depend the wise carrying out of his policies. They gave him the power of absolute removal, and they placed in his hands the control of the action of all those who took part in the discharge of the political duties of the executive department. They acted on a sound political principle * * *" Taft, *Our Chief Magistrate and His Powers* (1916), p. 76.

tions of executive employees without assuming corresponding responsibility for the conduct of executive affairs. It has no such power" (R. 131).

The inappropriateness of judicial inquiry into the ground of removal of a public officer or employee is further manifested by the nature of public office. It has been held repeatedly that the appointment to and the tenure in public office are not contract or property rights. *Taylor and Marshall* v. *Beckham,* 178 U. S. 548; *Crenshaw* v. *United States,* 134 U. S. 99; *In re Sawyer,* 124 U. S. 200; *Butler* v. *Pennsylvania,* 10 How. 402; ~~sec.~~ 2 Cooley, *Constitutional Limitations* (8th ed. 1927) 746, n. 1. As this Court early declared (*Matter of Hennen,* 13 Pet. 230, 258):

> All offices, the tenure of which is not fixed by the constitution, or limited by law, must be held either during good behavior, or (which is the same thing in contemplation of law), during the life of the incumbent; or must be held at the will and discretion of some department of the government, and subject to removal at pleasure. It cannot, for a moment, be admitted that it was the intention of the constitution, that those offices which are denominated inferior offices should be held during life. And if removable at pleasure, by whom is such removal to be made? In the absence of all constitutional provision or

> statutory regulation, it would seem to be a sound and necessary rule, to consider the power of removal as incident to the power of appointment.

In light of these considerations, it is readily apparent why this Court early announced that, if the office is held at the discretion of the appointing authority, "this court can have no control over the appointment or removal, nor entertain any inquiry into the grounds of removal. If the [appointing authority] is chargeable with any abuse of his power, this is not the tribunal to which he is amenable; * * *." *Matter of Hennen, supra,* at 261.

Although the advent of Civil Service laws and regulations have, to some extent, limited executive discretion over removal, judicial abstention from interference with those acts within the scope of executive discretion has been uniformly affirmed. Thus, the courts have intervened to enforce compliance with specific procedural steps required by law and regulations. *United States* v. *Wickersham,* 201 U. S. 390; *Borak* v. *Biddle,* 141 F. 2d 278 (C. A. D. C.), certiorari denied, 323 U. S. 738; *Wittner* v. *United States,* 110 C. Cls. 231; *United States* v. *Elchibegoff,* 106 C. Cls. 541, certiorari granted, 329 U. S. 704, writ dismissed, 329 U. S. 694. Where, however, such procedural steps have been taken, judicial inquiry into the basis for or propriety of removal has been consistently refused. See cases cited *supra,* pp. 61–62.

Thus, in *Keim* v. *United States,* 177 U. S. 290, where an employee had been discharged as inefficient, this Court refused to consider the contention that his discharge was "without just cause" and that at the time of his discharge he was an efficient clerk who had "discharged his duties faithfully and efficiently" and possessed "the necessary business capacity for the proper discharge of the duties of said clerkship," stating (p. 296):

> These are matters peculiarly within the province of those who are in charge of and superintending the departments, and until Congress by some special and direct legislation makes provision to the contrary, we are clear that they must be settled by those administrative officers.

And even where it is conceded that executive discretion was erroneously exercised, this Court has held that the executive action could not be judicially revised. *Eberlein* v. *United States,* 257 U. S. 82; *Kellom* v. *United States,* 55 C. Cls. 174. In the *Eberlein* case, plaintiff was removed from office, in accordance with the procedure then in force, on the ground that he had accepted bribes and defrauded the Government. Two years later, the Attorney General reinvestigated plaintiff's record and reported that in his judgment the charges were not sustained. Pursuant to a still further investigation, the President, by Executive

Order, restored plaintiff to eligibility for appointment, and plaintiff was subsequently reinstated. Affirming the judgment of the Court of Claims denying recovery of the salary of the office from the date of his removal to the date of his reinstatement, this Court declared (257 U. S. at 84)

> But the things required by law and regulations, were done, and the discretion of the authorized officers was exercised as required by law. It is settled that in such cases the action of executive officers is not subject to revision in the courts.

So here, if "the things required by law and regulations were done" (see *infra*, pp. 99–116) the action of the Civil Service Commission is not, under the rule established by the above cases, subject to judicial review. In the succeeding portions of this brief we shall demonstrate the application of these underlying principles to the particular constitutional questions which petitioner raises.

B. *The procedures here followed violate no rights of petitioner under the Fifth and Sixth Amendments.*—Petitioner contends that the executive action herein is in effect an adjudication of disloyalty which stigmatizes and punishes her no less than would a conviction for an infamous crime. Accordingly, she claims that the determination of the Civil Service Commission of disqualification for employment could not be validly

made without the procedural safeguards of the Fifth and Sixth Amendments.

We do not understand petitioner to assert that these Amendments are generally applicable to removals from Government employ. It is too late in history for that contention seriously to be advanced. If dismissal from Government service requires judicial process, the Constitution has been misinterpreted by the three branches of our Government since the founding of the Republic. Never in our history has it been thought that a Government employee could not be dismissed without trial by jury or a quasi-judicial administrative hearing subject to judicial review.

Prior to the inovation of a classified Civil Service, practically all officers and employees were appointed and removed, advanced and demoted, on the basis of their political opinions and affiliations. The power to dispense public offices was deemed a perquisite of success at the polls. See United States Civil Service Commission, *History of the Federal Civil Service* (1941); Sageser, *The First Two Decades of the Pendleton Act: A Study of Civil Service Reform* (1935); Foulke, *Fighting the Spoilsmen* (1919); Fish, *The Civil Service and The Patronage* (1905). The abuses inherent in the periodic wholesale summary dismissal of incumbent employees for political reasons led to the enactment of the Civil Service Act of 1883. Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 632 *et seq.* But the only limita-

tion placed upon the power to remove summarily was the prohibition of removal for failure to contribute to any political fund or to render any political service. 5 U. S. C. 633. To further the policy of that Act, however, President McKinley issued an Executive Order in 1897 prohibiting summary dismissals from positions subject to competitive examinations. Under the authority vested in him by R. S. 1753 (*infra*, p. 112), he ordered that no removal should be made "except for just cause and upon written charges filed with the head of the Department, or other appointing officer, and of which the accused shall have full notice, and an opportunity to make defense." Executive Order 101, July 27, 1897, Eighteenth Annual Report of the United States Civil Service Commission (1902) p. 282. Despite the Presidential Order, removals for political reasons appear to have continued. Since the Order was not issued to implement any statute restricting the executive power of removal, it was held not to be judicially enforceable.[53]

Accordingly, in 1912, proponents of the merit system obtained the passage of the Lloyd-La-Follette Act which enacted into positive law the provisions of the earlier Order. Employees were

[53] See *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Taylor* v. *Kercheval*, 82 Fed. 497 (C. C. D. Ind.).

given the right to be notified of the charges and to "be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; * * *." But although sponsored and enacted by advocates of a classified Civil Service, the Act expressly denied the right to a hearing. It provided that "no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; * * *." 37 Stat. 555.[44] Further congressional recognition that the removal of public personnel is a discretionary executive function was again evidenced in the Administrative Procedure Act of 1946, which specifically excluded from its coverage "the selection or tenure of an officer or employee of the United States other than examiners." Act of June 11, 1946, 60 Stat. 237, 5 U. S. C. 1004. See Sen. Doc. No. 248, 79th Cong., 2d Sess., pp. 202, 230, 260–261.

That record of one hundred-and-sixty years is "a page of history worth a volume of logic." It is a history the writing of which was shared by the judiciary. As we have already shown in Part II A, *supra*, pp. 59–67, the courts have always considered the selection and removal of Government employees to be an executive and legislative problem. Repeatedly, the courts declined to interfere with the exercise of executive discretion

[44] Slight changes in phraseology were made by the Act of June 10, 1948, 62 Stat. 354, 5 U. S. C., Supp. II, 652.

in this field for the reason that, in the absence of constitutional or statutory provision fixing the tenure of office, all inferior officers and employees hold office at the pleasure of the appointing authority. They refused to intervene even when dismissal was grounded on charges involving serious moral turpitude such as the acceptance of bribes (*Eberlein* v. *United States, supra*), the theft of Government documents (*Kent* v. *United States, supra*), and repeated attempts at seduction by force (*Golding* v. *United States, supra*).

Any contention, therefore, that the Fifth and Sixth Amendments are generally applicable to the removal of public employees would fly in the face of long-established doctrine. To so urge would be to ask this Court to hold that all the decisions to which we have adverted were erroneously decided, and that the Lloyd-LaFollette Act, which has been in uncontested effect since 1912, is invalid. To avoid taking that extreme position, petitioner instead asserts that dismissal because reasonable grounds exist for belief that she is disloyal is an exception to the rule which has hitherto prevailed.

It is claimed on behalf of petitioner that publicly to brand her as disloyal to her Government and to exclude her from Government employment is akin to a conviction for treason. Such action, it is said, constitutes punishment of a severe type which can not be imposed without satisfying the requirements of the Fifth and Sixth Amendments and is in direct conflict with the principles enun-

ciated by the Court in *United States* v. *Lovett*, 328 U. S. 303; see also *Cummings* v. *Missouri*, 4 Wall. 277, and *Ex Parte Garland*, 4 Wall. 333.

The *Lovett* case is the keystone of petitioner's position. In that case, the question for decision was the constitutionality of Section 304 of the Urgent Deficiency Appropriation Act of 1943, 57 Stat. 431, 450, which provided that after November 15, 1943, no salary or compensation should be paid Goodwin B. Watson, William E. Dodd, Jr., and Robert Morss Lovett (except for services as jurors or members of the armed forces) out of any monies then or thereafter appropriated unless they were prior to November 15, 1943, again appointed by the President with the advice and consent of the Senate. Construing the Act as imposing a "permanent proscription from any opportunity to serve" (328 U. S., at 316), this Court held it invalid as a bill of attainder.

The *Lovett* case thus involved a highly extraordinary legislative enactment, which named three particular individuals and imposed on them a permanent disability which could be removed only by Congress. The decision invalidating such a statute cannot be construed as overruling *sub silentio* the multitude of cases sustaining the executive power to dismiss employees without a hearing for inefficiency, misconduct, violation of law or regulations, or, indeed, for no assigned cause whatever. Nor can it be construed as depriving either Congress or the Executive of the power to prescribe qualifications for federal em-

ployment, to adopt regulations for the conduct of federal employees, and to require dismissal of those whom the Executive determines have failed to satisfy such qualifications or abide by such regulations. Indeed, at the very next term this Court, in *United Public Workers* v. *Mitchell,* 330 U. S. 75, sustained provisions of the Hatch Act which required that federal employees abstain from certain political activities, and imposed "a penalty of dismissal from employment" (330 U. S. at 79) for violation. In so doing it made no suggestion that determination of the fact of violation was not a purely administrative matter to be made according to any procedure which the Executive deemed appropriate, or that such a determination was entitled to any form of judicial review.[55]

The limited scope of the *Lovett, Cummings* and *Garland* cases was made plain by this Court in *American Communications Assn.* v. *Douds,* 339 U. S., at pp. 413–4:

> Those cases and this also, according to the argument, involve the proscription of certain occupations to a group classified according to belief and loyalty. But there

[55] The applicable rules of the Civil Service Commission provided merely for determination of the fact of violation by the Commission "after due notice and opportunity for explanation." Civil Service Rule 15 (set out in the Appendix to the Government's brief in *Mitchell*). This Court pointed out that "The act provides no administrative or statutory review for the order of the Civil Service Commission" (330 U. S. at 93).

> is a decisive distinction: in the previous decisions the individuals involved were in fact being punished for *past* actions; whereas in this case they are subject to possible loss of position only because there is substantial ground for the congressional judgment that their beliefs and loyalties will be transformed into *future* conduct. Of course, the history of the past conduct is the foundation for the judgment as to what the future conduct is likely to be; but that does not alter the conclusion that § 9 (h) is intended to prevent future action rather than to punish past action.

These observations are precisely applicable here. Petitioner was dismissed from her employment because it was the considered judgment of the President that beliefs, associations and activities such as the Loyalty Review Board concluded she possessed rendered an employee unqualified for public office. Her dismissal was preventative not punitive. The loyalty program was instituted because the President had substantial reason to believe that government employees who came within the categories prescribed in Executive Order 9835 constituted a potential threat to our system of Government. (See pp. 24–57, *supra*.) It does not purport to punish past conduct; it looks to a present condition—whether reasonable grounds exist for belief that an employee "is" disloyal—as a basis for predicting the likelihood of future conduct which the President had every right to forestall. The fact that her dis-

missal may have injured her reputation and her ability to earn a living does not mean that petitioner has been punished. "Punishment presupposes * * * an act for which retribution is exacted. The fact that harm is inflicted by governmental authority does not make it punishment * * * because it deprives of what otherwise would be enjoyed. But there may be reasons other than punitive for such deprivation." Frankfurter, J., concurring in *United States* v. *Lovett, supra,* at 324.

We submit, therefore, that petitioner's dismissal may not be characterized as punishment for the purpose of invoking the protection of the Fifth and Sixth Amendments. In so far as she has been injured by the stigma to her reputation, we see no basis for holding that the stigma of disloyalty is a thing apart, which gives rise to constitutional rights not applicable to other dismissals from the Government service. The difference in harm resulting from a dismissal on loyalty grounds and a dismissal for offenses of serious moral turpitude is at most a difference in degree, not in kind. It might be equally difficult for one dismissed because of the acceptance of bribes, theft, sex offenses, drunkenness, or even inefficiency, to obtain suitable employment elsewhere. Yet, as we have noted, *supra,* p. 71, the courts have refused to afford judicial review in those cases.

It seems to us that in so far as dismissal for disloyalty has peculiarities which distinguish it

from dismissal for bribery, theft and other offenses, they are adverse to petitioner's conclusions. The harm to the individual must be weighed against the harm to the public. The problem is one of "balancing the conflicting individual and national interests involved". *American Communications Ass'n.* v. *Douds, supra,* p. 410. From the point of view of the security of the nation, the retention in the Government service of one suspected of theft or a similar offense would not be of great importance, and the revelation of the method of detection and the names of witnesses would probably not affect the public interest. But disloyalty in the Government service under present circumstances is a matter of great public concern. And it was the informed judgment of the President and those charged by him with administering the loyalty program that in many instances disclosure of the identity of informants, and of investigative techniques and sources of information, would be strongly against the public interest. That judgment rested primarily on the available evidence as to the conspiratorial nature of the international Communist movement as disclosed, *inter alia,* in the report of the Canadian Royal Commission, the Dennis trial, and much of the testimony before Congressional committees. As we have indicated, the Executive Order calls for the maximum disclosure consistent with security requirements. The Loyalty Review Board has

endeavored to secure the testimony and permit cross-examination of informants wherever possible. (See *infra*, p. 102.) Nevertheless, the necessity that certain types of information be kept confidential is inherent in the nature of the program and of the threats which it was intended to combat.

Similar considerations apply to judicial review. Thus, it is not in the best interests of an efficient Civil Service that an employee be dismissed on charges of bribery, if, in fact, he is not guilty. Although, as we have pointed out, it would be inappropriate for the courts to review such matters of internal administration, nevertheless, the determination whether an accused is guilty of the charges of bribery is one which the courts are capable of making. Disloyalty in the government service, however, presents an entirely different problem. The fact that the information on which a determination of disloyalty is based must at times be kept confidential would seem to preclude judicial review. As this Court said of an analogous problem in *Chicago & S. Air Lines* v. *Waterman Corp.*, 333 U. S. 103, 111:

> The President, both as Commander-in-Chief and as the Nation's organ for foreign affairs has available intelligence services whose reports are not and ought not to be published to the world. It would be intolerable that courts, without the relevant information, should review and perhaps nullify actions of the Executive taken

> on information properly held secret. Nor can courts sit *in camera* in order to be taken into executive confidences. * * *

Moreover, it must be recognized that it is in the public interest that only those whose loyalty is beyond suspicion be employed by the Government. We cannot ignore the world situation in which not merely two ideologies but two adverse forces presently exist. Infiltration of government service is now a recognized technique for the overthrow of Government. Under the circumstances, dismissal could properly be based not on proven fact but on suspicion.[55a] But, as the Lord Chancellor of England has said in a similar context (*Rex* v. *Halliday* (*Ex parte Zadig*), (1917) A. C. 260, 269), "it seems obvious that no tribunal for investigating the question whether circumstances of suspicion exist warranting some restraint can be imagined less appropriate than a Court of law." See also *Von Knorr* v. *Miles,* 60 F. Supp. 962, 971 (D. Mass.), reversed on other grounds, *Von Knorr* v. *Griswold,* 156 F. 2d 287 (C. A. 1).

We conclude, therefore, as did the court below (R. 135), that "upon the contention that suspicion of disloyalty has characteristics distinguishing it from suspicion of other offenses,

[55a] In fact the Order requires far more than suspicion; it contemplates careful investigation, opportunity to the employee to testify, and dismissal only if on all the evidence "reasonable grounds exist for belief that the person involved is disloyal."

• • • the differences tend to solidify rather than to weaken the application of the doctrine that the President and the Congress are responsible for the qualifications, ability, judgment and loyalty of Government employees and that removal from Government employment is within their discretion."

C. *The action here taken does not infringe any constitutionally protected right of petitioner to freedom of speech.*—Petitioner further attacks the loyalty order and the action taken with respect to her as an infringement of rights of free speech guaranteed by the First Amendment.[86] In this area, also, we believe, petitioner's contentions must be assessed in the light of history. Executive and legislative concern with the problem of loyalty in the Federal Government is not new. Thus we are told that President Washington wished appointments to go only to those who were "sound supporters of the new system." Fish, *The Civil Service and the Patronage* (1905) 9.[87] During President Lincoln's admin-

[86] Since petitioner does not brief this point, but merely refers to Judge Edgerton's dissenting opinion, it is difficult to know just what her contentions are. We shall, however, deal herein with what appears to us to be the principal arguments which have been suggested in the dissenting opinion, the briefs for petitioners in Nos. 7 and 8, and other public discussions of the order.

[87] In a letter of September 27, 1795, to the Acting Secretary of State, Washington stated, "I shall not, whilst I have the honor to Administer the government, bring a man into any office, of consequence knowingly whose political tenets are adverse to the measures which the *general* government

istration a policy of dismissing all employees deemed disloyal appears to have been pursued as a matter of course.[58] President Wilson was

are pursuing; for this, in my opinion, would be a sort of political Suicide." Washington, Writings (Fitzpatrick Ed.) Vol. 34, p. 315.

[58] Detailed evidence of the extent to which such a policy of dismissal was followed is not readily available since it does not appear that the policy was ever formalized in terms of presidential instructions or regulations. The practice is, however, indicated with sufficient clarity by the following:

The Annual Report of the Postmaster General for 1861 (S. Doc. No. 1, 37th Cong., 2d Sess., Vol. 3, p. 582) states: "By the existing laws all postmasters and mail-carriers, and all other persons engaged in handling the mails of the United States, or in clerical service, were required to take the usual oath of allegiance to this government, as well as for the faithful performance of their duties. Whenever it was made apparent by their declarations, or by their conduct, that there was a practical repudiation of the obligation of this oath, whether the party was a postmaster or a postal contractor, I ordered a removal from office in the one case and the deprivation of contract in the other. * * *"

Similar evidence appears in the *Report on the Civil Service of the United States*, House Report No. 47, 40th Cong., 2d Sess. (1868). The Jenckes Committee had sent interrogatories to numerous public officers which included questions with respect to political considerations affecting appointments and removals from office. Only two of the answers relating to these questions are set out in the Report. The Commissioner of Customs stated, "I never inquired about the politics of anyone, except during the war, and then only to satisfy myself that he was loyal" (p. 20). The Superintendent of the Assay Office, New York City, stated that in making appointments "Good character, capacity, and, in the light of recent events, *loyalty*, are *sine quo non*" and further stated that "during the war two of our workmen were removed for carrying their partisanship to the point of practical disloyalty" (p. 23).

That like policies were followed by others in President

similarly faced with the problem of disloyalty during World War I. On April 7, 1917, he issued a confidential executive order providing that

> The head of a department or independent office may forthwith remove any employee when he has ground for believing that the retention of such employee would be inimical to the public welfare by reason of his conduct, sympathies or utterances, or because of other reasons growing out of the war. Such removal may be made without other formality than that the reasons shall be made a matter of confidential record, subject, however, to inspection by the Civil Service Commission.[59]

We have already set out the procedures adopted during World War II, for screening of disloyal applicants for employment and dismissal of employees deemed disloyal (*supra*, pp. 14–24).

Thus, it is apparent that measures to insure the loyalty of federal employees have been adopted

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Lincoln's administration is indicated by the statement that Secretary of War Stanton, on the day of his confirmation, "consulted with the 'committee on loyalty of Federal Employes' in order to learn who in his Department * * * could be trusted and who must be arrested or dismissed." F. A. Flower, *Edwin McMasters Stanton* (1905), p. 119. The Committee referred to was evidently a select committee of the House of Representatives appointed pursuant to resolution of Mr. Potter, adopted July 9, 1861, 56 Cong. Globe 26.

[59] The entire text of the order and of certain accompanying correspondence is set out in Corwin, *The President* (1948), pp. 433–4, n. 100.

in every major crisis which this nation has had to face. So far as appears, those measures were applied without distinction based on the responsibility of the position held or "sensitiveness" of the agencies affected. They were, moreover, often applied without regularized procedure, without opportunity for even a limited hearing, and with little or no attempt to prescribe standards for determination of disloyalty. Accordingly, the thrust of petitioner's argument is that a kind of action which has been taken by the executive in every major crisis presenting problems of loyalty was in each case unconstitutional.

Petitioner's argument goes further than that, however, for in asserting that political opinions, associations and activities may not constitutionally be considered as a basis for appointment or removal from office, she is in effect asserting that the practice followed by almost every president from Jefferson to Cleveland was unconstitutional. It is notorious that during that era in our history, political affiliations were regarded as almost the primary consideration in making appointments, and removals for political grounds were commonplace. See, generally, Fish, *The Civil Service and Patronage* (1905); United States Civil Service Commission, *History of the Federal Civil Service, 1789 to the Present* (1941). The prevailing practice was that "to the victor belong the spoils", a practice which was authoritatively described as meaning that "the entire force of

the civil service of the United States may be changed for mere political opinion." H. Rep. No. 47, 40th Cong., 2d Sess., p. 5.[60] While this "indiscriminate removal of public officers for a mere difference of political opinion" (Democratic Party Platform of 1832, quoted in Civil Service Commission, *History of the Federal Civil Service, supra,* p. 21) was often roundly condemned, it was never thought to present any constitutional question or other occasion for judicial relief. On the contrary, it is in the context of this prevailing practice that the cases cited in Point IIA of this Brief were decided.[61] In the light of this history and these authorities, we respectfully submit that the First Amendment cannot be regarded as placing any limitation on the executive power of removal from Government office.

Assuming, however, that questions of appointment and dismissal of federal employees can give rise to justiciable issues under the First Amendment, we think it clear under principles recently reiterated by this Court in *United Public Workers* v. *Mitchell, supra,* and *American Communications Ass'n.* v. *Douds, supra,* that Executive Order 9835 is subject to no constitutional infirmity.

In *United Public Workers* v. *Mitchell, supra,* this Court upheld a legislative prohibition of political activity by federal employees. In so doing

[60] For a contemporary description see T. H. Benton, *Thirty Years' View* (1865) pp. 159–163.

[61] For cases refusing to consider allegations that dismissals were for purely political reasons see note 53, supra.

it recognized that the measure in question interfered "with what otherwise would be the freedom of the civil servant under the First, Ninth and Tenth Amendment" (330 U. S. at 95). But it held that since Congress could reasonably consider that the prohibition in question was appropriate to maintain the integrity and competency of the civil service, it lay within Congressional power. It stated the guiding principles in these terms (330 U. S. at 102):

> We have said that Congress may regulate the political conduct of government employees "within reasonable limits," even though the regulation trenches to some extent upon unfettered political action. The determination of the extent to which political activities of governmental employees shall be regulated lies primarily with Congress. Courts will interfere only when such regulation passes beyond the generally existing conception of governmental power. That conception develops from practice, history, and changing educational, social and economic conditions.

These principles, we believe, control the disposition of the present case. The President has concluded, on the basis of extensive investigations and studies by both the Executive and Legislative branches, of the experience of other nations, and of facts peculiarly within his knowledge concerning our international relations, that the existence

of the world totalitarian movements of Nazism and Communism raised substantial dangers of serious evils to be expected from the presence within the federal service of adherents of those movements. In the light of the peculiar opportunities afforded Government employees for espionage and other conduct destructive of the most vital interests of the nation, he has concluded that the government must protect itself against the presence within the federal service of any person who there is reasonable ground to believe is disloyal to the United States. Accordingly he has adopted a type of regulation which clearly comes within the "generally existing conception of governmental powers", for like measures have been adopted in every period of comparable crises. That others may differ with the President as to the necessity or wisdom of such a course is immaterial. The judicial inquiry is limited to the question whether there was a reasonable basis for the executive judgment.[82] We have set forth

[82] See *United Public Workers* v. *Mitchell*, *supra*, at p. 99. "Congress and the President are responsible for an efficient public service. If, in their judgment, efficiency may be best obtained by prohibiting active participation by classified employees in politics as party officers, or workers, we see no constitutional objection".

And again at p. 101: "For regulation of employees it is not necessary that the act regulated be anything more than an act reasonably deemed by Congress to interfere with the efficiency of the public service".

That the determination was here made by the executive rather than by Congress serves, if anything, to strengthen the case for judicial non-review of his judgment. As we have

above the considerations on which that judgment was based (*supra*, pp. 24–57); we submit they leave no room for doubt that the judgment was a reasonable one. The words of this Court in the *Mitchell* case (with one appropriate substitution) are completely apposite here: "To declare that the present supposed evils * * * are beyond the power of [the President] to redress would leave the nation impotent to deal with what many sincere men believe is a material threat to the democratic system". (p. 99).

The fact that the Executive Order is concerned itself in part with a state of mind, and with organizational associations, does not require a contrary conclusion. This Court dealt with a similar problem in *American Communications Assn.* v. *Douds, supra,* in which it sustained a provision denying the facilities of the National Labor Relations Board to labor organizations whose officers were members of or affiliated with the Communist Party, or believed in or taught the overthrow of the Government by force or by illegal or unconstitutional methods. It said (339 U. S. at 391):

> The fact that the statute identifies persons by their political affiliations and beliefs, which are circumstances ordinarily irrelevant to permissible subjects of gov-

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pointed out, the efficiency and integrity of the public service is the primary concern of the executive, and he has inherent power to regulate that service (see Point II, *supra*).

ernment action, does not lead to the conclusion that such circumstances are never relevant. *In re Summers,* 325 U. S. 561 (1945); *Hamilton* v. *Regents,* 293 U. S. 245 (1934). We have held that aliens may be barred from certain occupations because of a reasonable relation between that classification and the apprehended evil, *Clarke* v. *Deckebach,* 274 U. S. 392 (1927); *Pearl Assurance Co.* v. *Harrington,* 313 U. S. 549 (1941), even though the Constitution forbids arbitrary banning of aliens from the pursuit of lawful occupations. *Truax* v. *Raich,* 239 U. S. 33 (1915); *Takahashi* v. *Fish and Game Commission,* 334 U. S. 410 (1948). Even distinctions based solely on ancestry, which we declared "are by their very nature odious to a free people," have been upheld under the unusual circumstances of wartime. *Hirabayashi* v. *United States,* 320 U. S. 81 (1943). If accidents of birth and ancestry under some circumstances justify an inference concerning future conduct, it can hardly be doubted that voluntary affiliations and beliefs justify a similar inference when drawn by the legislature on the basis of its investigations.

The *Douds* case involved a regulation by Congress of private associations in the exercise of its powers over interstate commerce. It thus presented different, and more difficult, problems than those raised by a regulation of the federal service, over which, as we have shown, the execu-

tive and legislative branches have generally been held to have complete discretion.[63] Nevertheless, with necessary reservations based on the historical and practical considerations peculiarly applicable to governmental control of the government service, the approach taken in that case affords a useful analogy for decision of this case.

This Court's decision in *Douds* rested, ultimately, on a balancing of conflicting interests (p. 410). In arriving at its conclusion the Court emphasized the fact that the regulation there involved was not one aimed at preventing utterances or beliefs. "Section 9 (h), in other words, does not interfere with speech because Congress fears the consequences of speech; it regulates harmful conduct which Congress has determined is carried on by persons who may be identified by their political affiliations and belief." Moreover, it was aimed, not at the "products of advocacy" but at strikes and other obstructions to commerce that could be accomplished *"without* advocacy or persuasion that seeks acceptance in the competition of the market." "Speech may be fought with speech * * * This is the command of the First Amendment. But force may and must be met with force" (p. 396).

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[63] Compare: "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board become Government agencies or may be regulated as such" (339 U. S. at 402).

Putting the same thought in another way, the Court said that the Act proceeded "not against the groups or beliefs identified therein, but only against the combination of those affiliations or beliefs with occupancy of a position of great power over the economy of the country" (pp. 403–404). And it added "[The First] Amendment requires that one be permitted to believe what he will. It requires that one be permitted to advocate what he will unless there is a clear and present danger that a substantial public evil will result therefrom. It does not require that he be permitted to be the keeper of the arsenal" (p. 412).

Like considerations are applicable here. Executive Order 9835 is not a prohibition of advocacy or expression of views. It does not declare illegal any organization, or prohibit any of its activities. It is aimed at conduct—at the danger that certain types of persons, if allowed to remain in the Government service, may betray the trust reposed in them by the commission of acts injurious to the national interest. Beliefs and affiliations are relevant only as the means of identifying those who are susceptible of such conduct. They are significant because, in combination with occupancy of positions of power and trust, they create "' tempting opportunities' to commit acts deemed harmful" (339 U. S. at 392) to the national interest and, indeed, existence. Regulations of this type "are not presumptively bad because they interfere with and, in some of its

manifestations, restrain the exercise of First Amendment rights" (339 U. S. at 399).

The assertion is vigorously pressed, however, that the feared danger is remote and hypothetical. In weighing that assertion it must be remembered that "insofar as the problem is one of drawing inferences concerning the need for regulation of particular forms of conduct from conflicting evidence, this Court is in no position to substitute its judgment as to the necessity or desirability of the statute for that of [the executive]" (339 U. S. at 400–401). Moreover, it is plain that the question is not answered by mechanical application of the phrase "clear and present danger." In the *Douds* case this Court emphasized that "The question with which we are here faced is not the same one that Justices Holmes and Brandeis found convenient to consider in terms of clear and present danger" (p. 396).[64] And it concluded that the case before it was an appropriate one for applying the principle that "nothing in the Constitution prevents Congress from acting in time to prevent potential injury to the national economy from becoming a reality" (p. 406).

[64] The Court's conclusion was rested on the nature of the regulation as one aimed at conduct, not expression. Here, that conclusion is reinforced by the fact that the regulation operates on government employees. Thus the opinion in the *Mitchell* case makes no reference to "clear and present danger", and repeatedly emphasizes the deference due the legislative (or executive) judgment.

What the argument as to remoteness of the danger comes down to is an assertion that the Government is powerless to protect itself from possible espionage and fifth column activities in aid of hostile foreign powers on the part of its employees until they occur and are discovered; that it must ignore the evidence that one of the techniques by which the Communist Party seeks to establish the dictatorship of the proletariat is the obtaining of every possible foothold in the government service; that it must wait until the Communists have become too powerful to be eradicated from that service before doing anything to eradicate them. It is true that the vast majority of Government employees are loyal and that only a very small number have been dismissed for disloyalty, but it is also beside the point. It is equally beside the point that few, if any, of those who have been so dismissed have been shown to have engaged in illegal conduct. Faced with a potential enemy whose aim appears to be world domination and the destruction of all civil liberties, the Government is not required to wait until war is declared or a coup d'état has begun. The President is entitled to insist that government servants, like Caesar's wife, be above reproach.[48]

[48] Compare the following observations of Judge Hand in *United States* v. *Dennis*, 183 F. 2d 201, 213:

"The question before us, and the only one, is how long a government, having discovered such a conspiracy, must wait. When does the conspiracy become a "present danger"? The jury has found that the conspirators will strike as soon as

But, it is said, the danger, if any, exists only as to employees of "sensitive" agencies, or as to employees holding positions of a certain degree of responsibility. The argument overlooks the "deference due [executive] determination." (339

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success seems possible, and obviously, no one in his senses would strike sooner. Meanwhile they claim the constitutional privilege of going on indoctrinating their pupils, preparing increasing numbers to pledge themselves to the crusade, and awaiting the moment when we may be so far extended by foreign engagements, so far divided in counsel, or so far in industrial or financial straits, that the chance seems worth trying. That position presupposes that the Amendment assures them freedom for all preparatory steps and in the end the choice of initiative, dependent upon that moment when they believe us, who must await the blow to be worse prepared to receive it.

We need not say that even so thoroughly planned and so extensive a confederation would be a "present danger" at all times and in all circumstances; the question is how imminent: that is, how probable of execution—it was in the summer of 1948, when the indictment was found. We must not close our eyes to our position in the world at that time. By far the most powerful of all the European nations had been a convert to Communism for over thirty years; its leaders were the most devoted and potent proponents of the faith; no such movement in Europe of East to West had arisen since Islam. Moreover in most of West Europe there were important political Communist factions, always agitating to increase their power; and the defendants were acting in close concert with the movement. The *status quo*, hastily contrived in 1945, was showing strains and tensions, not originally expected. Save for the unexpected success of the airlift, Britain, France and ourselves would have been forced out of Berlin, contrary to our understanding of the convention by which we were there. We had become the object of invective upon invective; we were continuously charged with aggressive designs against other nations; our efforts to re-

U. S. at 401) The identical contention was made with at least equal force in *United Public Workers* v. *Mitchell, supra,* and was rejected by this Court. Just as in that case Congress could rationally conclude that political activity of any government employee, however menial, would interfere with the efficiency of the public service, so here the Presi-

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establish their economic stability were repeatedly set down as a scheme to enslave them; we had been singled out as the chief enemy of the faith; we were the eventually doomed, but the still formidable, protagonist of that decadent system which it was to supplant. Any border fray, any diplomatic incident, any difference in construction of the *modus vivendi*—such as the Berlin blockade we have just mentioned—might prove a spark in the tinder-box, and lead to war. We do not understand how one could ask for a more probable danger, unless we must wait till the actual eve of hostilities. The only justification which can be suggested is that in spite of their efforts to mask their purposes, so far as they can consistently with the spread of the gospel, discussion and publicity may so weaken their power that it will have ceased to be dangerous when the moment may come. That may be a proper enough antidote in ordinary times and for less redoutable combinations; but certainly it does not apply to this one. *Corruptio optimi pessima.* True, we must not forget out own faith; we must be sensitive to the dangers that lurk in any choice; but choose we must, and we shall be silly dupes if we forget that again and again in the past thirty years, just such preparations in other countries have aided to supplant existing governments, when the time was ripe. Nothing short of a revived doctrine of *laisser faire*, which would have amazed even the Manchester School at its apogee, can fail to realize that such a conspiracy creates a danger of the utmost gravity and of enough probability to justify its suppression. We hold that it is a danger 'clear and present.'"

That the danger has intensified, rather than lessened, since 1948 goes without saying.

dent could rationally conclude that no activity of the Government was so unimportant that it could be entrusted to persons deemed disloyal to the United States.

Petitioner's final objection is to the "vague and uncertain standards" (Br. for Pet. p. 39) of the loyalty order. The assertion seems to be that the order permits a broad inquiry into beliefs of every kind, including beliefs bearing no reasonable relation to the evil at which the President aimed, and that it is for that reason defective although a more narrowly drawn order might have been valid. The argument is buttressed with reference to the evils of "thought control" (R. 145).

In considerable part the argument seems to be addressed, not to what the President's order says, but to what it is asserted some loyalty boards have done. Thus the dissenting opinion below catalogues a number of questions said to have been asked by loyalty boards in other cases. (R. 144).[66] But the issue here is necessarily confined to a determination of the validity of the order on its face. This is so for two reasons. In the first place, petitioner has at no time raised any issue as to the conduct of the loyalty proceeding other than the one, discussed *infra,* pp. 99–111, concern-

[66] Compare *Yakus* v. *United States*, 321 U. S. 414, 434: "* * * we have no occasion to pass upon determinations of the Administrator or the Emergency Court, said to violate due process, which have never been brought here for review".

ing her right to be informed of evidence which the loyalty boards concluded must be kept confidential. In the second place, as we have shown above (pp. 59–67, *supra*), no question as to the sufficiency of the evidence or the conduct of the proceedings (save for compliance with statute or regulation) can be judicially considered in cases of appointment or dismissal from government employment. Thus, if any constitutional issues are open in this proceeding, they are limited to a consideration of the order on its face.

Looking to the terms of the Order, it is obvious that it does not contemplate any form of "thought control". While the ultimate test, disloyalty, is a state of mind, the order clearly indicates that that state of mind is to be inferred from relevant "activities and associations" (Part V, Sec. 2) including those specifically enumerated. The Order is not concerned with undisclosed beliefs.[67] It is thus totally unlike the provision requiring an oath that one does not believe in the overthrow of the government by illegal or unconstitutional means on which this Court divided equally in the *Douds* case. That provision, by its terms, compelled a disclosure of beliefs and made disqualifi-

[67] It may be noted that the Order imposes no compulsion to testify. Loyalty Boards have no power of subpoena. (See Memorandum No. 41 of the Loyalty Review Board, cited *infra*, pp. 102–103). While the affected employee may appear he is under no compulsion to do so. If he does appear he is under no compulsion to answer questions that may be put to him.

cation from office the automatic penalty for either avowal of or refusal to disavow the proscribed belief.

Viewed—as it must be—as a measure to prevent possible conduct, the likelihood of which is to be determined on the basis of the activities and associations of the persons involved, the loyalty order does not present any serious question on the score of indefiniteness. As we have seen, it does not prohibit expressions, and hence there is no question of defining the precise range of the expressions prohibited. Moreover it involves no criminal sanctions, and hence does not present the question whether the strict requirements of definiteness and certainty of a criminal statute have been met.[68] Indeed, as we have seen, (*supra*, pp. 74–76) the Order is in no sense punitive.

Measured by the standards traditionally applied in cases involving government employment the order is certainly not deficient. As we have already shown, in the absence of legislation to the contrary, all inferior officers and employees hold office at the pleasure of the appointing authority. To hold office at the will of a superior and to be removable therefrom only in accordance with definite standards are opposite and inherently conflicting ideas. That the President and Congress have attempted to restrict the discretion of admin-

[68] In the *Douds* case this Court was necessarily concerned with that question, since the requisite oath could readily result in a prosecution for perjury in which the precise meaning of the oath would be all important.

istrative officials by laying down standards for removal does not mean that the rights thus conferred upon employees are raised to the status of Constitutional rights. And it may be noted that the standard laid down in the Lloyd-LaFollette Act, which has been in uncontested effect since 1912, is that removal shall be made only "for such cause as will promote the efficiency of the service." It has never been suggested that that standard is void for indefiniteness; yet, plainly, that legislative standard is no less broad than that specified in the Order, *i. e.*, "that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States." (Part V, Section 1). Indeed, as we have indicated, the standard of the Executive Order is merely one example of "such cause as will promote the efficiency of the service."[∞]

To require a narrower test would be to ignore the essential nature of the problem. International Communism is, in many of its aspects, a secret and conspiratorial movement. It operates in the United States not only directly through the Communist Party of America and those who admit membership in it, but also through numerous "front" organizations and through individuals who endeavor to conceal their membership in or

[∞] In the light of the attacks now made on it, it is interesting to compare the careful effort made in Executive Order 9835 to prescribe standards for dismissal with the extreme generality of President Wilson's order, set out *supra*, p. 81.

sympathetic association with the Party. Hence to secure direct and conclusive proof is often difficult and always time-consuming. For purposes of criminal prosecution, (*e. g.* the Smith Act), it is appropriate that the tests be drawn narrowly. The Government can and should be expected in criminal proceedings to bear a heavy burden of proof. And in general, criminal prosecution must await the commission of unlawful acts; it cannot anticipate them. Like considerations may be true as to general regulations applicable to private individuals or organizations. But in dealing with the federal service, the executive is not required to wait for proof; it may properly insist that government employees be above suspicion; it can—as the order does—base dimissals upon "reasonable grounds to believe" rather than incontrovertible proof. In regulating on that basis, it is, we submit, entirely appropriate to define the applicable standards in terms which will allow resort to the kind of evidence and considerations which any reasonable man, faced with a like inquiry concerning his employees, would resort to. A narrower standard might have risked jeopardizing our national security by allowing to remain within federal service persons whose loyalty could not be relied on, and might have imposed an impossible administrative burden. The choice of methods was, we believe, for the President. In the area of appointment to and removal from the Government service the courts will interfere with

the executive judgment only when what has been done bears no reasonable relation to a legitimate governmental interest. *United Public Workers* v. *Mitchell, supra.*

III. THE ACTION HERE TAKEN WAS IN FULL CONFORMITY WITH THE EXECUTIVE ORDER AND WITH APPLICABLE STATUTORY PROVISIONS

A. *The procedure followed in petitioner's removal complied with the Executive Order.*—Petitioner's argument that the procedure followed by the Loyalty Boards did not conform to the requirements of the Executive Order rests primarily on Part V of the Order (Appendix, *infra,* p. 127) which provides that the standard for the refusal of employment shall be that "on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States."[70]

Construing the word "evidence" in its judicial sense, petitioner urges that the findings of the Loyalty Boards were not based on "all the evidence." She points out that those who gave information against her did not appear at the hearings, were not identified to her, and that no opportunity for cross-examination was afforded. The Loyalty Boards, she asserts, had no knowledge of informants' identity, no knowledge of the

[70] For present purposes we assume, *arguendo*, without conceding, the power of the courts to review executive action in this area for compliance with executive regulations. But see cases cited in note 53, *supra*, p. 69.

officials who certified the information as coming from reliable sources, and hence were not in a position to exercise their judgment in weighing the reliability of the confidential reports. Petitioner contends, therefore, that "all the evidence" before the Loyalty Boards, *i. e.*, the sworn statements of petitioner and witnesses and affiants in her behalf, was favorable and supplied no ground for belief that petitioner was disloyal.

Petitioner further points out that Part II, Section 2a provides that "an officer or employee who is charged with being disloyal shall have a right to an administrative hearing." It is asserted that, in light of the preamble to the Order which states that both the United States and the accused employee must be afforded "maximum protection," this must mean a full administrative hearing which meets the minimum standards of due process.

The issue presented is simply one of presidential intention. We submit that petitioner entirely misapprehends the terms of the Executive Order. In accordance with the Directives of the Loyalty Review Board (5 C. F. R. (1949 ed.) §§ 210, 230), petitioner was informed by interrogatory of the nature of the evidence against her in so far as security considerations permitted (R. 20–25), was advised of her right to reply to the charges in writing (R. 20), her right to have a hearing before a Loyalty Board upon request (R. 21), her right to appear personally before

the Board, to be represented by counsel of her own choice, and to present evidence in her behalf (R. 21), and her right of appeal to the Loyalty Review Board (R. 26). Pursuant to petitioner's requests, hearings were held before the Regional Loyalty Board and the Loyalty Review Board. Petitioner was represented by counsel of her choice and testified personally. All affidavits offered by her were accepted, and all witnesses presented by her testified. Petitioner was specifically questioned with reference to the charges contained in the interrogatory, but the identity of the informants against her was not revealed. (R. 60, 61, 127, LB, LRB, *passim*). We submit that the Order, read as a whole, required no more.

When the words "all the evidence" are placed in their proper context, it is plain that they were intended merely to mean all the information available to the Loyalty Boards. It is equally clear that the Order does not specify that "all the evidence" must be revealed to the accused employee at the hearing. Part I, Section 3 of the Order provides that investigation of applicants shall be made "at all available pertinent sources of information," including files of the Federal Bureau of Investigation, files of any other appropriate Government investigatory or intelligence agency, and files of the House Committee on un-American activities. Part IV requires that the names of confidential informants not be revealed.

Part II, Section 2b states that the nature of the charges shall be set forth as specifically as, in the discretion of the employing agency, security considerations permit. Moreover, on March 13, 1948, the President, by Directive, unequivocally directed that reports, records and files relating to the loyalty program be preserved in strict confidence. 13 F. R. 1359. It is apparent, therefore, that the "maximum protection" intended to be afforded employees is that protection consistent with the dictates of security. Petitioner's argument that "evidence" is employed in its judicial meaning—that all witnesses must appear, either in person or by affidavit, in the proceeding and on the record—is conclusively and emphatically belied by the Executive Order.

In this connection, it should be noted that Judge Edgerton in the court below was mistaken in his belief that the regulations of the Loyalty Review Board prohibit the appearance of all witnesses for the Government (R. 138). In accord with the spirit and purpose of the Order in affording the accused employee as much protection against unfounded accusations as is possible in the circumstances, the Loyalty Review Board has instructed all Loyalty Boards that "all reasonable efforts should be made to induce all identified non-confidential witnesses who have given pertinent information adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross-examination." The

Loyalty Boards were advised that "if any such witness declines or fails to appear as a witness after being thus invited [11] by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere." Memorandum No. 41 of the Loyalty Review Board, dated April 20, 1949, revised April 17, 1950 (Appendix, *infra*, pp. 152

Considered in this frame of reference, the words "evidence" and "administrative hearing," even if they stood alone, could not have the meaning for which petitioner contends. But they do not stand alone. The accused employee's rights are twice explicity defined in the Executive Order. He has the right to appear before the Board personally, to be accompanied by counsel of his choice, and to present evidence on his behalf, through witness or by affidavit. Part II, Sections 2a, 2b (Appendix, *infra*, pp. 123–124). No other rights normally incident to a quasi-judicial hearing are specified. Indeed, such rights could not be conferred consistently with the Presidential mandate that the identity of confidential informants be kept secret."

[11] Since the Loyalty Boards do not possess the power of subpoena under the Executive Order, witnesses can only be "invited."

[12] Petitioner develops at some length an assertion that the practise among loyalty boards varies substantially and that a number of boards afford the employee full rights of con-

That a quasi-judicial hearing was not intended is conclusively manifested in The Report of the President's Temporary Commission on Employee Loyalty (1947), which resulted in Executive Order

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frontation. We have difficulty in understanding how such an asserted variation among loyalty boards helps to establish that the practice in the present case was in violation of the executive order. In any event, however, the asserted variations do not extend to the point to which petitioner would push them. On this question we quote from a letter from Mr. Richardson, the Chairman of the Loyalty Review Board to the Solicitor General, commenting on these statements in petitioner's brief:

"It is quite true that applicants or persons requiring reinstatement receive conditional appointments, and such appointments are specifically based upon the need of an ultimate loyalty check. Such persons are in the hands of the Civil Service Commission. Therefore, the Commission has set up Regional Boards in the various Civil Service Regions in the United States. That is why a particular Regional Board usually hears cases only in its own Region, just as is the case with reference to cases heard in the Circuit Court of Appeals in a particular Circuit. As I have pointed out, there is no real distinction between the letter of charges in the Agencies and the interrogatories in the Regional Boards. They are both for the same purpose and result in the same kind of a hearing.

"It is not true that the Loyalty Boards do not have a consistent practice and vary widely. The regulations in force apply to all Boards and in order to make sure that the procedure is regular, the Loyalty Review Board post-audits every case, for the specific purpose of assuring itself that there have been no material departures from the fixed procedure. There are more than 150 of these Boards, many of them having lay members. It is quite possible that methods of interrogation may vary, but in all material respects each of these Boards is definitely under procedure authority furnished to such Board by the Loyalty Review Board. It is difficult to conceive how the Loyalty Review Board could

9835 (see *supra,* pp. 34–37). Paragraph 3c of Executive Order 9806, 11 F. R. 13863, which created the Temporary Commission, asked that body to recommend the procedure which should be established to guarantee a fair hearing. In language identical in substance to Part II, Section 2 of Executive Order 9835, which followed, the Commission recommended that (p. 36):

> An employee who is charged with being disloyal shall have a right to an administrative hearing before a Loyalty Board in the employing department or agency. He may appear personally, accompanied by

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have used greater care in securing regularity than has been used.

"This is particularly true with respect to the treatment of the FBI reports. All Boards are permitted to disclose the names of non-confidential witnesses but are never permitted to disclose the names of confidential informants or surrounding facts from which such identity could be obtained. Specific directions have been given to each Board to use personal witnesses where such witnesses are non-confidential, but it must be understood that the Board has no right of subpoena and no funds for fees and testimony before any Board is purely voluntary. But it must be particularly remembered that it is only the very occasional case where substantial evidence relating to disloyalty comes from a non-confidential witness.

"Nor is it true that the Regional Boards have not developed consistent attitudes for the protection of employees, in comparison with the Agency Boards. The Regional Boards are of very high caliber, carefully selected for experience and impartiality. And the results of their hearings have been found to be entirely consistent and they are particularly careful in following the procedural directives authorized by the Loyalty Review Board."

> counsel or representative of his own choice, with witnesses, and present any evidence, including affidavits, in his behalf. * * *

In its report, the Temporary Commission stated (p. 29):

> Fair administrative process will provide an employee with the right to a hearing with counsel and witnesses, and even though he will not have the right of confrontation, he will have an opportunity to present his side of the case prior to adjudication.
>
> The action taken by a federal department or agency to remove an employee is administrative in character and a hearing conducted for such a purpose is an administrative hearing and not a judicial proceeding. * * *

We think it significant, in ascertaining the President's intent in this connection, that dismissed Government employees have never been accorded a quasi-judicial hearing. The Lloyd-LaFollette Act, 5 U. S. C. 652, considered a landmark in civil service reform, requires no oral hearing whatever. And the Administrative Procedure Act, 5 U. S. C. 1001 *et seq,* expressly excludes "the selection or tenure of an officer or employee of the United States other than examiners" from its coverage (5 U. S. C. 1004). See Senate Document No. 248, 79th Congress, 2d Session, pp. 202, 260–261, 360. And see Point IIB, *supra.*

It is also to be noted that the Executive Order has been extensively criticized for failing to

provide the procedure which petitioner here contends it did provide. Thus Professors Chafee, Griswold, Katz, and Scott, of the Harvard Law School, pointed out in a communication to the New York Times,[73] that

> There is no provision that the accused shall be confronted by such evidence as there may be * * * no requirement that the evidence against him shall be introduced at the hearing at all. * * * no requirement that the findings of the loyalty board must be supported by the evidence. In fact, there is no requirement that the loyalty board make any findings whatever.

And see Emerson and Helfeld, *Loyalty Among Government Employees*, 58 Yale L. J. 1, 101 ff. These criticisms were given most earnest consideration by the Chairman of the Loyalty Review Board, who, in a public statement, set forth in detail the reasons why such provisions could not, in his view, be adopted.[74] As the court below

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[73] New York Times, April 13, 1947, p. 8E, col. 5.

[74] In a press release dated December 23, 1947 (reprinted in full in the Washington Post, Dec. 28, 1947, p. 10, col. 3–8), Mr. Richardson said:

"The point has been vigorously presented to us as follows, 'Every employee accused of disloyalty should be given the right to confront his accusers, and subject them to cross examination.' This contention has obvious force, and presents grave considerations to us. Why have we been unable to accept it?

"In nearly all cases the Bureau [Federal Bureau of Investigation] secures the facts for inclusion in its reports from

cogently remarked (R. 119), "If the Loyalty Boards were violating the President's instruc-

confidential sources, many of them closely connected with considerations sounding in national security. We are advised by the Bureau, that, in its experienced opinion, practically none of the evidential sources available will continue to be available to the Bureau if proper secrecy and confidence cannot at all times be maintained with respect to the original source of information, and that if the source of such information is to be disclosed—save in the exceptional case—the Bureau can be of much less service to the Board in making the essential basic investigation.

"In cases where sources of evidence are not confidential, and disclosure of sources, possibly with pertinent oral testimony, will not tend to hinder or impede the investigative work of the Bureau, we will make every reasonable effort to extend the scope of the evidential source disclosure, to the affected employee, at the hearing. But it must be appreciated that in the great majority of the cases, we apprehend that disclosure of evidential sources to the employee, and the resulting opportunity of cross-examination of such sources by him, will probably not be practicable.

"We recognize that the use of such a report as evidence by the various Loyalty Boards, without disclosure of the contents to the employee, does subject the employee to non-confrontation of witnesses against him, and does deprive him of the right of cross-examination of such witnesses—a situation which ought to, and does, give rise to most serious questions in the minds of the general public. So serious is such a situation that it has been strongly urged upon us by responsible persons, that, rather than permit such a situation to exist, *the entire loyalty program should be abandoned*, even if the Government should thereupon be compelled to cease attempting to screen out disloyal employees.

"We have given the matter the most careful consideration, and we can see no way in which the loyalty program may have the benefit of the skilled investigation of any competent investigative agency, and particularly of the Federal Bureau of Investigation, unless the facts received in confidence by

tions in so crucial a part of a program so widely publicized, he would surely have known it and

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the investigators can be kept entirely confidential at all times and under all conditions.

"We were therefore faced with the decision whether to refuse at all times to disclose the Bureau report to the employee—save in the exceptional cases noted above—or to advise the Civil Service Commission that, in our opinion, the proposed loyalty program as planned should not be permitted to function.

"After the most careful consideration, we have concluded that the objection to non-confrontation and no cross-examination, while important, is not essentially controlling.

"In the first place, the Board is of the opinion, that, legally, the Government is entitled to discharge any employee for reasons which seem sufficient to the Government, and without extending to such employee any hearing whatsoever. We believe that the rights of the Government in that respect are at least equal to those possessed by private employers. We also think that the Government, if necessary, may conclude that any suspicion of disloyalty whatsoever, however remote, might, in view of the dangerous possibilities involved, suffice to warrant employee dismissal without hearing.

"Having in mind what we have thus indicated the Board believes are the basic legal rights of the Government, and in an effort to avoid the serious objections indicated, we have endeavored to plan methods of procedure and determination in loyalty cases, calculated to minimize to the fullest degree possible, any possible injustice which might be visited upon an employee by reason of the Government's refusal to disclose the Bureau report and the original evidence sources.

"To this end, and as I have pointed out, we will extend to each employee through a letter of charges or a bill of interrogatories, as the case may be, a detailed identification of the facts upon which the Board proposes to consider the question of disloyalty. We will require a proper hearing on such charges, with full right to the employee to be present with his counsel and witnesses, and we have directed the delivery to the employee of a transcript of such hearing, if requested.

would have corrected the error." Accordingly, we think it clear that the procedure followed by

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Moreover, we shall specifically require the Loyalty Board to give careful consideration in its final determination as to whether, in the opinion of the Board, the employee has been actually handicapped in his defense because of the non-confrontation and lack of opportunity to cross-examine source witnesses. Moreover, under the Executive Order, a specific rule of decision is established, to wit:

"'* * * whether on all the evidence in the record, reasonable grounds exist for belief that the person involved is disloyal.'

"In further protection to the employee, if the conclusion of the initial Loyalty Board should be unfavorable to him, the Executive Order provides for the right of appeal to the Head of the Agency or Department, with a duty imposed upon such Head to grant the employee a proper hearing and review, with a speedy determination thereon. This Agency Head is, under governmental procedure, a very important figure in the life of an employee, and we regard a review by him as of the greatest importance.

"If the decision upon such appeal is again unfavorable, we have provided for a further appeal to our Loyalty Review Board, granting to the employee the right of appearance before a Panel of the Board, with his attorney or representative, and with a right of argument on the full record. Thereafter, the Board may, in its discretion upon majority vote, review the decision of its Panel. In the interest of uniformity, and to see that this procedure is properly followed, we intend to maintain a careful check on all proceedings in the various Loyalty Boards, the decisions made by such Boards, and may, in our discretion, remand any proceeding back for further investigation, examination, hearing and determination. No such permissions have ever before been extended to investigated employees by the Government.

"When the scope of the review and hearing rights thus extended to the employee is considered, and in the light of the general public confidence in the Federal Bureau of Investigation, and the procedure the Bureau has adopted in connection with the loyalty program, together with the test-

the Loyalty Boards fully conformed to the requirements of the Executive Order.[75]

B. *The Order and the procedure here followed are not inconsistent with any statutory requirements.*—Petitioner has apparently abandoned any contention that the Order is inconsistent with statutory requirements. Nevertheless, to dispel any possible doubts that may have been raised on this score, we shall here indicate the reasons why any such contention would be wholly groundless. As we have already pointed out, the inherent power of the President to remove any federal employee, or to direct such removal by his subordinates and to prescribe procedures and standards for them to follow, is not open to question. The issue is thus whether Congress has done anything to limit the President's power. We have pointed out that the courts are reluctant

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ing rule requiring the ultimate establishment, under all the evidence, of reasonable grounds for believing that the employee is disloyal, we have felt that the Government might justly carry on the proposed loyalty program, even though an affected employee may have had neither confrontation or cross-examination of evidence sources under the agency report. If further experience shall change our minds in this regard, we shall not hesitate to so report."

[75] "Since this involves an interpretation of an administrative regulation a court must necessarily look to the administrative construction of the regulation if the meaning of the words used is in doubt. * * * the ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation." *Bowles* v. *Seminole Rock Co.*, 325 U. S. 410, 413–414.

to find in an act of Congress a limitation on the executive power of removal, insisting that to take away that power "would require very clear and explicit language." *Shurtleff* v. *United States,* 189 U. S. 311, 315. Here, however, it is abundantly clear that Executive Order No. 9835 is not only entirely consistent with applicable legislation, but is, indeed, clearly within the powers conferred on the President by such legislation and has been expressly ratified by Congress.

The Act of March 3, 1871, 16 Stat. 514, R. S. 1753, 5 U. S. C. 631, provides that:

> The President is authorized to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof, and ascertain the fitness of each candidate in respect to age, health, character, knowledge, and ability for the branch of service into which he seeks to enter; and for this purpose he may employ suitable persons to conduct such inquiries, and may prescribe their duties, and establish regulations for the conduct of persons who may receive appointments in the civil service.

In the Lloyd-LaFollette Act of 1912, 5 U. S. C. 652, Congress further provided that "no person in the classified civil service of the United States shall be removed therefrom except for such cause as will promote the efficiency of said

service * * *." Read in conjunction with R. S. 1753, *supra,* which authorizes the President "to prescribe such regulations for the admission of persons into the civil service of the United States as may best promote the efficiency thereof * * * and establish regulations for the conduct of persons who may receive appointments" it is clear that vast discretion is thereby vested in the President. As we have already shown, *supra,* pp. 59–67, the courts have uniformly refused to review executive determinations of what constitutes a cause which will promote the efficiency of the service.

Although the Lloyd-LaFollette Act would apparently preclude removal on political grounds,[78] we think it demonstrable that a removal because of reasonable doubt as to the loyalty of an employee is not a removal for political reasons but one to "promote the efficiency of the service." Looking to R. S. 1753, we see that those words have reference to the character as well as the physical and mental qualifications of employees.

[78] As to removals for political reasons, the Civil Service Act of January 16, 1883, 22 Stat. 403, 5 U. S. C. 633 (2) 5, provided only that no person "will * * * be removed or otherwise prejudiced" for failing to contribute to any political fund or to render any political service. It was held that this did not prevent the removal of Democrats by Republicans. See *Page* v. *Moffett*, 85 Fed. 38 (C. C. D. N. J.); *Morgan* v. *Nunn*, 84 Fed. 551 (C. C. M. D. Tenn.); *Flemming* v. *Stahl*, 83 Fed. 940 (C. C. W. D. Ark.); *Carr* v. *Gordon*, 82 Fed. 373 (C. C. N. D. Ill.); *Taylor* v. *Kercheval*, 82 Fed. 497 (C. C. D. Ind.).

Certainly, loyalty to our form of Government may reasonably be deemed a necessary attribute of character. Indeed, Congress has made it a prerequisite of employment that every employee take an oath of office that he will support and defend the Constitution of the United States against all enemies foreign and domestic, and that he will bear true faith to the same. 5 U. S. C. 16."

We cannot ignore the fact that our form of Government is presently confronted by a Government and an international revolutionary organization which has sought to use the infiltration of its sympathizers and adherents into the civil service of this and other nations as a means of espionage and, ultimately, of capturing power to effect the overthrow of that government. The question is thus not one of freedom of political opinion but whether persons deemed capable of conduct disloyal to the United States may be denied the opportunity for such conduct. The President would be remiss in his duty to "faithfully execute the laws" and his oath to support the Constitution if he did not protect and defend the Government against those subversive forces which may seek to destroy it.

That the President properly construed his authority in this respect is made plain by the atti-

" Thus the Civil Service Commission has correlated loyalty and efficiency. See Departmental Circular No. 222 of the United States Civil Service Commission, June 20, 1940. (Appendix, infra, pp. 148-152).

tude of Congress as set forth in the numerous enactments and reports which we have summarized above (*supra*, pp. 37–39, 51–55). Indeed, the history of legislative concern with the problem of employee loyalty from 1940 on (*supra*, pp. 25–57) renders any suggestion that Executive Order 9835 is contrary to the will of Congress little less than astonishing. As we have pointed out, Congress has expressly forbidden the use of any appropriated funds for the payment of compensation to any person who advocates or is a member of an organization that advocates the overthrow of the Government by force or violence. In 1941, and again in 1942, it appropriated funds for the investigation of subversive employees, directing the F. B. I. to report its findings to the Congress. In 1946 the House Committee on Civil Service investigated employee loyalty and recommended the creation of an interdepartmental commission to study the problem further. The commission so created by the President came forward the following year with recommendations which were embodied in Executive Order 9835. Shortly thereafter, a measure passed the House of Representatives to embody its provisions into legislation; while the measure died in the Senate nothing in its legislative history suggests that either house of Congress disapproved of the Presidential loyalty program or doubted the President's authority to adopt it. Thereafter, the question of employee

loyalty continued to be most actively investigated and discussed at every session of Congress; repeatedly Congressional Committee Reports took notice and approved of the President's loyalty program and suggested means of strengthening and extending it. And, at each session of the Congress, funds were appropriated to carry out the program.

This record reflects a clear legislative approval and ratification of the President's construction of his authority. Such approval is often manifested by appropriation of funds. Cf. *Fleming* v. *Mohawk Co.*, 331 U. S. 111, 116; *Ludecke* v. *Watkins*, 335 U. S. 160, 173, n. 19. It is equally clearly shown by the fact that, in legislating on the intimately related subject of dismissals in the interest of national security, Congress approved the loyalty program and assumed that no further legislation was necessary to effectuate it. Cf. *Hirabayashi* v. *United States*, 320 U. S. 81, 91. Indeed, in view of the extraordinary attention given by Congress and the public generally to the problems of employee loyalty, it is inconceivable that if there had been any substantial doubt in Congress as to the validity of the loyalty program that doubt would not have been expressed with all possible vigor. In the circumstances, an assertion of lack of legislative authorization or approval could not possibly prevail.

CONCLUSION

The loyalty program has, since its inception, been subject to much criticism by many whose devotion to the American way of life cannot be questioned. Such pleas are to be neither ignored nor belittled but their forum is in the Congress and the President's office. "The problem," as the Executive Director of the National Civil Service League has written, is "not so much a matter of the legal issues involved as it is practical application of the President's loyalty review order and its administration." Kaplan, *Loyalty Review of Federal Employees,* 23 N. Y. U. L. Q. Rev. 437, 446. We think it appropriate to repeat here the observation of this Court in a similar context (*Ludecke* v. *Watkins,* 335 U. S. 160, 172):

> Such great * * * powers may be abused, no doubt, but that is a bad reason for having judges supervise their exercise, whatever the legal formulas within which such supervision would nominally be confined. In relation to the distribution of constitutional powers among the three branches of the Government, the optimistic Eighteenth Century language of Mr. Justive Iredell * * * is still pertinent:
>
> "All systems of government suppose they are to be administered by men of common sense and common honesty. In our country, as all ultimately depends on the voice of the people, they have it in their power, and it is to be presumed they generally will

> choose men of this description; but if they will not, the case, to be sure, is without remedy. If they choose fools, they will have foolish laws. If they choose knaves, they will have knavish ones. But this can never be the case until they are generally fools or knaves themselves, which, thank God, is not likely ever to become the character of the American people." (*Case of Fries* [9 Fed. Cas. No. 5126], at p. 836.)

Only by ignoring traditional conceptions of the judicial function can the attacks on the loyalty program made in this and the companion cases be regarded as presenting any occasion for judicial relief.

It is respectfully submitted that the judgment of the court below should be affirmed.

PHILIP B. PERLMAN,
Solicitor General,

H. G. MORISON,
Assistant Attorney General,

JAMES L. MORRISSON,
SAMUEL D. SLADE,
BENJAMIN FORMAN,
Attorneys,
Department of Justice.

October, 1950

APPENDIX

1. Section 9A of the Hatch Act, Act of August 2, 1939, c. 410, 53 Stat. 1147, 1148, 5 U. S. C., Supp. II, 118j:

> (1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid from funds authorized or appropriated by any Act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.
>
> (2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

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2. EXECUTIVE ORDER 9835

PRESCRIBING PROCEDURES FOR THE ADMINISTRATION OF AN EMPLOYEES LOYALTY PROGRAM IN THE EXECUTIVE BRANCH OF THE GOVERNMENT

Whereas each employee of the Government of the United States is endowed with a measure of trusteeship over the democratic processes which are the heart and sinew of the United States; and

Whereas it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States; and

Whereas, although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes; and

Whereas maximum protection must be afforded the United States against infiltration of disloyal persons into the ranks of its employees, and equal protection from unfounded accusations of disloyalty must be afforded the loyal employees of the Government:

Now, Therefore, by virtue of the authority vested in me by the Constitution and statutes of the United States, including the Civil Service Act of 1883 (22 Stat. 403), as amended, and section 9A of the act approved August 2, 1939 (18 U. S. C. 61i), and as President and Chief Executive of the United States, it is hereby, in the interest of the internal management of the Government, ordered as follows:

Part I.—Investigation of Applicants

1. There shall be a loyalty investigation of every person entering the civilian employment of any department or agency of the executive branch of the Federal Government.

a. Investigations of persons entering the competitive service shall be conducted by the Civil Service Commission, except in such cases as are covered by a special agreement between the Commission and any given department or agency.

b. Investigations of persons other than those entering the competitive service shall be conducted by the employing department

or agency. Departments and agencies without investigative organizations shall utilize the investigative facilities of the Civil Service Commission.

2. The investigations of persons entering the employ of the executive branch may be conducted after any such person enters upon actual employment therein, but in any such case the appointment of such person shall be conditioned upon a favorable determination with respect to his loyalty.

a. Investigations of persons entering the competitive service shall be conducted as expeditiously as possible; provided, however, that if any such investigation is not completed within 18 months from the date on which a person enters actual employment, the condition that his employment is subject to investigation shall expire, except in a case in which the Civil Service Commission has made an initial adjudication of disloyalty and the case continues to be active by reason of an appeal, and it shall then be the responsibility of the employing department or agency to conclude such investigation and make a final determination concerning the loyalty of such person.

3. An investigation shall be made of all applicants at all available pertinent sources of information and shall include reference to:

a. Federal Bureau of Investigation files.
b. Civil Service Commission files.
c. Military and naval intelligence files.
d. The files of any other appropriate government investigative or intelligence agency.
e. House Committee on un-American Activities files.

f. Local law-enforcement files at the place of residence and employment of the applicant, including municipal, county, and State law-enforcement files.

g. Schools and colleges attended by applicant.

h. Former employers of applicant.

i. References given by applicant.

j. Any other appropriate source.

4. Whenever derogatory information with respect to loyalty of an applicant is revealed a full field investigation shall be conducted. A full field investigation shall also be conducted of those applicants, or of applicants for particular positions, as may be designated by the head of the employing department or agency, such designations to be based on the determination by any such head of the best interests of national security.

PART II. INVESTIGATION OF EMPLOYEES

1. The head of each department and agency in the executive branch of the Government shall be personally responsible for an effective program to assure that disloyal civilian officers or employees are not retained in employment in his department or agency.

a. He shall be responsible for prescribing and supervising the loyalty determination procedures of his department or agency, in accordance with the provisions of this order, which shall be considered as providing minimum requirements.

b. The head of a department or agency which does not have an investigative organization shall utilize the investigative facilities of the Civil Service Commission.

2. The head of each department and agency shall appoint one or more loyalty boards, each composed of not less than three representatives of the department or agency concerned, for the purpose of hearing loyalty cases arising within such department or agency and making recommendations with respect to the removal of any officer or employee of such department or agency on grounds relating to loyalty, and he shall prescribe regulations for the conduct of the proceedings before such boards.

a. An officer or employee who is charged with being disloyal shall have a right to an administrative hearing before a loyalty board in the employing department or agency. He may appear before such board personally, accompanied by counsel or representative of his own choosing, and present evidence on his own behalf, through witnesses or by affidavit.

b. The officer or employee shall be served with a written notice of such hearing in sufficient time, and shall be informed therein of the nature of the charges against him in sufficient detail, so that he will be enabled to prepare his defense. The charges shall be stated as specifically and completely as, in the discretion of the employing department or agency, security considerations permit, and the officer or employee shall be informed in the notice (1) of his right to reply to such charges in writing within a specified reasonable period of time, (2) of his right to an administrative hearing on such charges before a loyalty board, and (3) of his right to appear before such board personally, to be accompanied by counsel or representative of his own choos-

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ing, and to present evidence on his behalf, through witness or by affidavit.

3. A recommendation of removal by a loyalty board shall be subject to appeal by the officer or employee affected, prior to his removal, to the head of the employing department or agency or to such person or persons as may be designated by such head, under such regulations as may be prescribed by him, and the decision of the department or agency concerned shall be subject to appeal to the Civil Service Commission's Loyalty Review Board, hereinafter provided for, for an advisory recommendation.

4. The rights of hearing, notice thereof, and appeal therefrom shall be accorded to every officer or employee prior to his removal on grounds of disloyalty, irrespective of tenure, or of manner, method, or nature of appointment, but the head of the employing department or agency may suspend any officer or employee at any time pending a determination with respect to loyalty.

5. The loyalty boards of the various departments and agencies shall furnish to the Loyalty Review Board, hereinafter provided for, such reports as may be requested concerning the operation of the loyalty program in any such department or agency.

Part III—Responsibilities of Civil Service Commission

1. There shall be established in the Civil Service Commission a Loyalty Review Board of not less than three impartial persons, the members of which shall be officers or employees of the Commission.

a. The Board shall have authority to review cases involving persons recommended for dismissal on grounds relating to loyalty by the loyalty board of any department or agency and to make advisory recommendations thereon to the head of the employing department or agency. Such cases may be referred to the Board either by the employing department or agency, or by the officer or employee concerned.

b. The Board shall make rules and regulations, not inconsistent with the provisions of this order, deemed necessary to implement statutes and Executive orders relating to employee loyalty.

c. The Loyalty Review Board shall also:

(1) Advise all departments and agencies on all problems relating to employee loyalty.

(2) Disseminate information pertinent to employee loyalty programs.

(3) Coordinate the employee loyalty policies and procedures of the several departments and agencies.

(4) Make reports and submit recommendations to the Civil Service Commission for transmission to the President from time to time as may be necessary to the maintenance of the employee loyalty program.

2. There shall also be established and maintained in the Civil Service Commission a central master index covering all persons on whom loyalty investigations have been made by any department or agency since September 1, 1939. Such master index shall contain the name of each person investigated, adequate identifying information concerning each such person, and a reference to each department and agency which has conducted a

loyalty investigation concerning the person involved.

a. All executive departments and agencies are directed to furnish to the Civil Service Commission all information appropriate for the establishment and maintenance of the central master index.

b. The reports and other investigative material and information developed by the investigating department or agency shall be retained by such department or agency in each case.

3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

PART IV—SECURITY MEASURES IN INVESTIGATIONS

1. At the request of the head of any department or agency of the executive branch an investigative agency shall make available to such head, personally, all investigative material and information collected by the investigative agency concerning any employee or prospective employee of the

requesting department or agency, or shall make such material and information available to any officer or officers designated by such head and approved by the investigative agency.

2. Notwithstanding the foregoing requirement, however, the investigative agency may refuse to disclose the names of confidential informants, provided it furnishes sufficient information about such informants on the basis of which the requesting department or agency can make an adequate evaluation of the information furnished by them, and provided it advises the requesting department or agency in writing that it is essential to the protection of the informants or to the investigation of other cases that the identity of the informants not be revealed. Investigative agencies shall not use this discretion to decline to reveal sources of information where such action is not essential.

3. Each department and agency of the executive branch should develop and maintain, for the collection and analysis of information relating to the loyalty of its employees and prospective employees, a staff specially trained in security techniques, and an effective security control system for protecting such information generally and for protecting confidential sources of such information particularly.

Part V—Standards

1. The standard for the refusal of employment or the removal from employment in an executive department or agency on grounds relating to loyalty shall be that, on all the evidence, reasonable grounds exist for belief that the person involved is disloyal to the Government of the United States.

2. Activities and associations of an applicant or employee which may be considered in connection with the determination of disloyalty may include one or more of the following:

a. Sabotage, espionage, or attempts or preparations therefor, or knowingly associating with spies or saboteurs;

b. Treason or sedition or advocacy thereof;

c. Advocacy of revolution or force or violence to alter the constitutional form of government of the United States;

d. Intentional, unauthorized disclosure to any person, under circumstances which may indicate disloyalty to the United States, of documents or information of a confidential or non-public character obtained by the person making the disclosure as a result of his employment by the Government of the United States;

e. Performing or attempting to perform his duties, or otherwise acting, so as to serve the interests of another government in preference to the interests of the United States.

f. Membership in, affiliation with or sympathetic association with any foreign or domestic organization, association, movement, group or combination of persons, designated by the Attorney General as totalitarian, fascist, communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny other persons their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

PART VI.—MISCELLANEOUS

1. Each department and agency of the executive branch, to the extent that it has not already done so, shall submit, to the Federal Bureau of Investigation of the Department of Justice, either directly or through the Civil Service Commission, the names (and such other necessary identifying material as the Federal Bureau of Investigation may require) of all of its incumbent employees.

a. The Federal Bureau of Investigation shall check such names against its records of persons concerning whom there is substantial evidence of being within the purview of paragraph 2 of Part V hereof, and shall notify each department and agency of such information.

b. Upon receipt of the above-mentioned information from the Federal Bureau of Investigation, each department and agency shall make, or cause to be made by the Civil Service Commission, such investigation of those employees as the head of the department or agency shall deem advisable.

2. The Security Advisory Board of the State-War-Navy Coordinating Committee shall draft rules applicable to the handling and transmission of confidential documents and other documents and information which should not be publicly disclosed, and upon approval by the President such rules shall constitute the minimum standards for the handling and transmission of such documents and information, and shall be applicable to all departments and agencies of the executive branch.

3. The provisions of this order shall not be applicable to persons summarily removed under the provisions of section 3 of the act of December 17, 1942, 56 Stat. 1053, of the act of July 5, 1946, 60 Stat. 453, or of any other statute conferring the power of summary removal.

4. The Secretary of War and the Secretary of the Navy, and the Secretary of the Treasury with respect to the Coast Guard, are hereby directed to continue to enforce and maintain the highest standards of loyalty within the armed services, pursuant to the applicable statutes, the Articles of War, and the Articles for the Government of the Navy.

5. This order shall be effective immediately, but compliance with such of its provisions as require the expenditure of funds shall be deferred pending the appropriation of such funds.

6. Executive Order No. 9300 of February 5, 1943, is hereby revoked.

HARRY S. TRUMAN.

THE WHITE HOUSE,
March 21, 1947.

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3. UNITED STATES CIVIL SERVICE COMMISSION,
Washington 25, D. C., December 4, 1947.

SIR: Part III of Executive Order No. 9835 prescribing procedures for the administration of an employee loyalty program in the Executive Branch of the Government requires the Department of Justice to furnish this Board with—

> the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate inves-

> tigation and determination, designates as Totalitarian, Fascist, Communist, or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.

In performance of said requirement, the Department of Justice has furnished to this Board a letter from the Attorney General containing the names so designated by him.

Part III of said Executive Order also requires this Board "to disseminate such information to all Departments and Agencies." A copy of said letter from the Attorney General is accordingly enclosed herewith and a copy is also being sent to each other Department and Agency of the Government. This Board is preparing and will shortly forward to you Rules, Regulations and Standards by which you are to be guided.

The President in addressing this Board said, with reference to the names to be furnished by the Department of Justice:

> Membership in an organization is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case.

In using the names set forth in said letter, you should have in mind these sentiments to which this Board subscribes.

SETH W. RICHARDSON,
Chairman, Loyalty Review Board.

Enclosure.

4. OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., November 24, 1947.

Honorable SETH W. RICHARDSON,
Chairman, Loyalty Review Board,
Civil Service Commission,
Washington, D. C.

MY DEAR MR. RICHARDSON: This is submitted pursuant to the President's Executive Order No. 9835 in which he stated that it is of vital importance that persons employed in the Federal service be of complete and unswerving loyalty to the United States, and further stated that although the loyalty of by far the overwhelming majority of all Government employees is beyond question, the presence within the Government service of any disloyal or subversive person constitutes a threat to our democratic processes. The order provided in Part III, section 3, as follows:

> 3. The Loyalty Review Board shall currently be furnished by the Department of Justice the name of each foreign or domestic organization, association, movement, group or combination of persons which the Attorney General, after appropriate investigation and determination, designates as totalitarian, fascist, communist or subversive, or as having adopted a policy of advocating or approving the commission of acts of force or violence to deny others their rights under the Constitution of the United States, or as seeking to alter the form of government of the United States by unconstitutional means.
>
> a. The Loyalty Review Board shall disseminate such information to all departments and agencies.

Under a previous Executive order (No. 9300), issued February 5, 1943, entitled "Establishing the Interdepartmental Committee to Consider Cases of Subversive Activity on the Part of Federal Employees," and under other relevant authority, the Department of Justice named a number of organizations as subversive. That list was disseminated among the Government agencies for use in connection with consideration of employee loyalty, and included the following organizations:

American League Against War and Fascism.
American Patriots, Inc.
American Peace Mobilization.
American Youth Congress.
Association of German Nationals (Reichsdeutsche Vereinigung).
Black Dragon Society.
Central Japanese Association (Beikoku Chuo Nipponjin Kai).
Central Japanese Association of Southern California.
Central Organization of the German-American National Alliance (Deutsche-Amerikanische Einheitsfront).
Communist Party of U. S. A.
Congress of American Revolutionary Writers.
Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan).
Dante Alighieri Society.
Federation of Italian War Veterans in the U. S. A., Inc. (Associazione Nazionale Conbattenti Italiani, Federazione degli Stati Uniti d'America).

Friends of the New Germany (Freunde des Neuen Deutschlands).
German-American Bund (Amerikadeutscher Volksbund).
German-American Vocational League (Deutsche-Amerikanische Berufsgemeinschaft).
Heimuska Kai, also known as Nokubei Heieki Gimusha Kai, Zaibei Nihonjin, Heiyaku Gimusha Kai, and Zaibei Heimusha Kai (Japanese Residing in American Military Conscripts Association).
Hinode Kai (Imperial Japanese Reservists).
Hinomaru Kai (Rising Sun Flag Society—a group of Japanese War Veterans).
Hokubei Zaigo Shoke Dan (North American Reserve Officers Association).
Japanese Association of America.
Japanese Overseas Central Society (Kaigai Dobo Chuo Kai).
Japanese Overseas Convention, Tokyo, Japan, 1940.
Japanese Protective Association (Recruiting Organization).
Jikyoku Iin Kai (Current Affairs Association).
Kibei Seinen Kai (Association of U. S. Citizens of Japanese Ancestry who have returned to America after studying in Japan).
Kyffhaeuser, also known as Kyffhaeuser League (Kyffhaeuser Bund), Kyffhaeuser Fellowship (Kyffhaeuser Kameradschaft).
Kyffhaeuser War Relief (Kyffhaeuser Kriegshilfswerk).
Lictor Society (Italian Black Shirts).
Mario Morgantini Circle.

Michigan Federation for Constitutional Liberties.
Namka Teikoku Gunyudan (Imperial Military Friends Group or Southern California War Veterans).
National Committee for the Defense of Political Prisoners.
National Federation for Constitutional Liberties.
National Negro Congress.
Nichibei Kogyo Kaisha (The Great Fujii Theatre).
Northwest Japanese Association.
Protestant War Veterans of the U. S., Inc.
Sakura Kai (Patriotic Society, or Cherry Association—composed of veterans of Russo-Japanese War).
Shinto Temples.
Silver Shirt Legion of America.
Sokoku Kai (Fatherland Society).
Suiko Sha (Reserve Officers Association, Los Angeles).
Washington Book Shop Association.
Washington Committee for Democratic Action.
Workers Alliance.

Under Part III, section 3, of Executive Order No. 9835, the following additional organizations are hereby designated:

American Polish Labor Council.
American Youth for Democracy.
Armenian Progressive League of America.
Civil Rights Congress and its affiliated organizations, including: Civil Rights Congress for Texas; Veterans Against Discrimination of Civil Rights Congress of New York.
The Columbians.
Communist Party, U. S. A., formerly Communist Political Association, and its

affiliates and committees, including: Citizens Committee of the Upper West Side (New York City); Committee to Aid the Fighting South; Dennis Defense Committee; Labor Research Association, Inc.; Southern Negro Youth Congress; United May Day Committee; United Negro and Allied Veterans of America.

Connecticut State Youth Conference.

Council on African Affairs.

Hollywood Writers Mobilization for Defense.

Hungarian-American Council for Democracy.

International Workers Order, including People's Radio Foundation, Inc.

Joint Anti-Fascist Refugee Committee.

Ku Klux Klan.

Macedonian-American People's League.

National Committee to Win the Peace.

National Council of American-Soviet Friendship.

Nature Friends of America (since 1935).

New Committee for Publications.

Photo League (New York City).

Proletarian Party of America.

Revolutionary Workers League.

Socialist Workers Party, including American Committee for European Workers' Relief.

Veterans of the Abraham Lincoln Brigade.

Workers Party, including Socialist Youth League.

Your attention is also directed to certain organizations which are operated as schools. While, of course, I am not of the view that any institution of learning, devoted to the advancement of knowledge, is subversive, it appears that these organizations are adjuncts of the Communist Party. They are as follows:

Abraham Lincoln School, Chicago, Illinois.
George Washington Carver School, New York City.
Jefferson School of Social Science, New York City.
Ohio School of Social Sciences.
Philadelphia School of Social Science and Art.
Samuel Adams School, Boston, Massachusetts.
School of Jewish Studies, New York City.
Seattle Labor School, Seattle, Washington.
Tom Paine School of Social Science, Philadelphia, Pennsylvania.
Tom Paine School of Westchester, New York.
Walt Whitman School of Social Science, Newark, New Jersey.

After the issuance of Executive Order No. 9835 by the President, the Department compiled all available data with respect to the type of organization to be dealt with under that order. The investigative reports of the Federal Bureau of Investigation concerning such organizations were correlated. Memoranda on each such organization were prepared by attorneys of the Department. The list of organizations herein certified is based on their recommendations as reviewed by the Solicitor General, the Assistant Attorneys General, and the Assistant Solicitor General, and by subsequent careful study of the recommendations of all.

In connection with the designation of these organizations I wish to reiterate, as the President has pointed out, that it is entirely possible that many persons belonging to such organizations may be loyal to the United States; that member-

ship in, affiliation with or sympathetic association with, any organization designated, is simply one piece of evidence which may or may not be helpful in arriving at a conclusion as to the action which is to be taken in a particular case. "Guilt by association" has never been one of the principles of our American jurisprudence. We must be satisfied that reasonable grounds exist for concluding that an individual is disloyal. That must be the guide.

The organizations named in this letter do not represent a complete or final compilation. For example, a number of small and local organizations are not listed. As to many organizations not named, the presently available information is insufficient to warrant a final determination as to their character. Others, presently innocuous, may become the victims of dangerous infiltrating forces and, as a consequence, become proper subjects for designation. New organizations may come into existence whose purposes and activities are in conflict with loyalty to the United States.

From time to time, therefore, as contemplated and directed by the Executive order, there will be furnished to the Board the names of those additional organizations and groups as to which the information received by this Department, resulting from continued investigation, indicates similar designations are required.

If I can be of further assistance to you in reference to the subject matter of this letter, please let me know.

Sincerely yours,

TOM C. CLARK,
Attorney General.

5. UNITED STATES CIVIL SERVICE COMMISSION,
Washington 25, D. C., September 21, 1948.

Memorandum No. 19

To All Executive Departments and Agencies.

Subject: Classification according to Section 3, Part III, of E. O. 9835 of Organizations Previously Designated by the Attorney General as within the purview of the Executive Order.

The Attorney General has furnished the Loyalty Review Board with information classifying the organizations which he has listed within the Executive Order under the following categories: (1) Totalitarian; (2) Fascist; (3) Communist; (4) Subversive; (5) Organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States"; and (6) Organizations which "seek to alter the form of government of the United States by unconstitutional means."

Enclosed for your information and guidance is a copy of the consolidated list prepared by the Attorney General of organizations previously designated as within Executive Order 9835 by the Attorney General's letters of November 24, 1947, and May 27, 1948 (clarified on August 4, 1948), according to the classifications of Section 3, Part III, of the Executive Order.

SETH W. RICHARDSON,
Chairman, Loyalty Review Board.

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CONSOLIDATED LIST OF ORGANIZATIONS PREVIOUSLY DESIGNATED AS WITHIN EXECUTIVE ORDER NO. 9835 BY LETTERS OF NOVEMBER 24, 1947, AND MAY 27, 1948, ACCORDING TO THE CLASSIFICATIONS OF SECTION 3, PART III OF THE EXECUTIVE ORDER

Totalitarian:

Black Dragon Society.
Ceneral Japanese Association (Beikoku Chuo Nipponjin Kai).
Central Japanese Association of Southern California.
Dai Nippon Butoku Kai (Military Virtue Society of Japan or Military Art Society of Japan).
Heimuska Kai, also known as Nokubei Heieki Gimusha Kai, Zaibel Nihonjin, Heiyaku Gimusha Kai, and Zaibei Heimusha Kai (Japanese Residing in America Military Conscripts Association).
Hinode Kai (Imperial Japanese Reservists).
Hinomaru Kai (Rising Sun Flag Society—a group of Japanese War Veterans).
Hokubei Zaigo Shoke Dan (North American Reserve Officers Association).
Japanese Association of America.
Japanese Overseas Central Society (Kaigai Dobo Chuo Kai).
Japanese Overseas Convention, Tokyo, Japan, 1940.
Japanese Protective Association (Recruiting Organization).
Jikyoku lin Kai (Current Affairs Association).
Kibei Seinen Kai (Association of U. S. Citizens of Japanese Ancestry who have returned to America after studying in Japan).

Nanka Teikoku Gunyudan (Imperial Military Friends Group or Southern California War Veterans).
Nichibei Kogyo Kaisha (The Great Fujii Theatre).
Northwest Japanese Association.
Peace Movement of Ethiopia.
Sakura Kai (Patriotic Society, or Cherry Association—composed of veterans of Russo-Japanese War).
Shinto Temples.
Sokoku Kai (Fatherland Society).
Suiko Sha (Reserve Officers Association Los Angeles).

Fascist:

American Patriots, Inc.
Ausland-Organization der NSDAP, Overseas Branch of Nazi Party.
Association of German Nationals (Reichsdeutsche Vereinigung).
Central Organization of the German-American National Alliance (Deutsche-Amerikanische Einheitsfront).
Citizens Protective League.
Dante Alighieri Society.
Federation of Italian War Veterans in the U. S. A., Inc. (Associazione Nazionale Conbattenti Italiani, Federazione degli Stati Uniti d' America).
Friends of the New Germany (Freunde des Neuen Deutschlands).
German-American Bund (Amerikadeutscher Volksbund).
German-American Republican League.
German-American Vocational League (Deutsche-Amerikanische Berufsgemeinschaft).
Kyffhaeuser, also known as Kyffhaeuser League (Kyffhaeuser Bund), Kyffhaeu-

ser Fellowship (Kyffhaeuser Kameradschaft).
Kyffhaeuser War Relief (Kyffhaeuser Kriegshilfswerk).
Lictor Society (Italian Black Shirts).
Mario Morgantini Circle.

Communist:

Abraham Lincoln School, Chicago, Illinois.
American League Against War and Fascism.
American Association for Reconstruction in Yugoslavia, Inc.
American Committee for European Workers' Relief.
American Committee for Protection of Foreign Born.
American Committee for Yugoslav Relief, Inc.
American Council for a Democratic Greece.
American Council on Soviet Relations.
American Croatian Congress.
American League for Peace and Democracy.
American Peace Mobilization.
American Polish Labor Council.
American Russian Institute (of San Francisco).
American Slav Congress.
American Youth Congress.
American Youth for Democracy.
Armenian Progressive League of America.
California Labor School, Inc., 216 Market Street, San Francisco, California.
Central Council of American Women of Croatian Descent, aka Central Council of American Croatian Women, National Council of Croatian Women.
Citizens Committee of the Upper West Side (New York City).

Civil Rights Congress and its affiliates.
Committee to Aid the Fighting South.
Communist Party, U. S. A.
Communist Political Association.
Connecticut State Youth Conference.
Congress of American Revolutionary Writers.
Congress of American Women.
Council on African Affairs.
Council for Pan-American Democracy.
Dennis Defense Committee.
Friends of the Soviet Union.
George Washington Carver School, New York City.
Hollywood Writers Mobilization for Defense.
Hungarian-American Council for Democracy.
International Labor Defense.
International Workers Order, including People's Radio Foundation, Inc.
Jefferson School of Social Science, New York City.
Jewish Peoples Committee.
Joint Anti-Fascist Refugee Committee.
Labor Research Association, Inc.
League of American Writers.
Macedonian-American People's League.
Michigan Civil Rights Federation.
National Committee for the Defense of Political Prisoners.
National Committee to Win the Peace.
Nation Council of Americans of Croatian Descent.
National Council of American-Soviet Friendship.
National Federation for Constitutional Liberties.
National Negro Congress.
Nature Friends of America (since 1935).
Negro Labor Victory Committee.

New Committee for Publications.
Ohio School of Social Sciences.
People's Educational Association.
People's Institute of Applied Religion.
People's Radio Foundation, Inc.
Philadelphia School of Social Science and Art.
Photo League (New York City).
Proletarian Party of America.
Revolutionary Workers League.
Samuel Adams School, Boston, Massachusetts.
School of Jewish Studies, New York City.
Seattle Labor School, Seattle, Washington.
Serbian Vidovdan Council.
Slovenian-American National Council.
Socialist Workers Party, including American Committee for European Workers' Relief.
Socialist Youth League.
Southern Negro Youth Congress.
Tom Paine School of Social Science, Philadelphia, Pennsylvania.
Tom Paine School of Westchester, New York.
United Committee of South Slavic Americans.
United Harlem Tenants and Consumers Organization.
United May Day Committee.
United Negro and Allied Veterans of America.
Veterans of the Abraham Lincoln Brigade.
Walt Whitman School of Social Science, Newark, New Jersey.
Washington Bookshop Association.
Washington Committee for Democratic Action.
Wisconsin Conference on Social Legislation.
Workers Alliance.

Workers Party, including Socialist Youth League.
Young Communist League.

Subversive:

Communist Party, U. S. A.
Communist Political Association.
German-American Bund.
Socialist Workers Party.
Workers Party.
Young Communist League.

Organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States":

Columbians.
Ku Klux Klan.
Protestant War Veterans of the United States.
Silver Shirt Legion of America.

Organizations which "seek to alter the form of government of the United States by unconstitutional means":

Communist Party, U. S. A.
Communist Political Association.
Socialist Workers Party.
Workers Party.
Young Communist League.

6. OFFICE OF THE ATTORNEY GENERAL,
Washington, D. C., August 5, 1948.

Hon. SETH W. RICHARDSON,
Chairman, Loyalty Review Board,
United States Civil Service Commission,
Washington 25, D. C.

MY DEAR MR. RICHARDSON: This is in further reference to your letters of May 28, 1948, and

July 28, 1948, wherein you request particularization with respect to the classification under Section 3, Part III, of Executive Order 9835 of the various organizations designated by me pursuant thereto in my respective letters to you as Chairman of the Loyalty Review Board, dated November 24, 1947, and May 27, 1948. I refer also to our informal discussion on the subject.

Section 3, Part III, of Executive Order 9835, as you have pointed out, sets forth six classifications of organizations within its contemplation. The language of Part V, Section 2f, is substantially identical. Applying the elementary rule of statutory construction, each of these classifications must be taken to be independent and mutually exclusive of the others. It may well be that a designated organization, by reason of origin, leadership, control, purposes, policies, or activities, alone or in combination, may fall within more than one of the specified classifications. In such cases a reasonable interpretation of the Executive Order would seem to require that designation be predicated upon its dominant characteristics rather than extended to include all other classifications possible on the basis of what may be subordinate attributes of the group. In classifying the designated organizations I have been guided by this policy. Accordingly, it should not be assumed that an organization's dominant characteristic is its only characteristic.

Attached hereto you will find a consolidated list containing the names of all of the organizations previously designated by me as within Executive Order 9835, segregated according to the classifica-

tions enumerated in Section 3, Part III, on the basis of dominant characteristics.

In your letter you indicate you have concluded that the fifth category of Section 3, Part III, i. e., organizations which have "adopted a policy of advocating or approving the commission of acts of force and violence to deny others their rights under the Constitution of the United States," is not based upon a question of loyalty and therefore would not come within the purview of the jurisdiction of the Board. I regret I cannot concur in this view. It is implicit within Executive Order 9835 that the criteria enumerated do involve aspects of loyalty which your Board, as well as the departments and agencies concerned, is required to consider in the execution of the duties imposed thereby. It is not open to the Board nor to any of the executive departments or agencies to disregard any of these criteria. The oath of office taken by every person elected or appointed to any office of honor or profit either in the civil, military, or naval service, except the President of the United States, as prescribed by the Act of May 13, 1884 (Sec. 16, Title 5, United States Code) includes the following language:

> I, A B, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same * * *.

It is difficult to reconcile informed membership or activity in any organization designated "as having adopted a policy of advocating or approving a commission of acts of force or violence to

deny others their rights under the Constitution of the United States" as consistent with loyalty to the Government of the United States or fulfillment of the oath of office taken by each employee of its executive departments and agencies.

I trust that this amplification of the designations previously made by me will serve to remove some of the difficulties which you state you have exerienced. If I can be of any further assistance in this regard please do not hesitate to call upon me.

Sincerely,

(S) TOM C. CLARK,
Attorney General.

Enclosure No. 437091.

UNITED STATES CIVIL SERVICE COMMISSION

Washington, D. C.

June 20, 1940
CX : JF : am

Departmental Circular No. 222
Subject: Removal of undesirable persons from the Government service.

To Heads of Departments and Independent Establishments:

Attention is invited to Section 1 of Civil Service Rule XII, regulating removals from the classified service, which reads as follows:

> "No person in the classified service of the United States shall be removed therefrom except for such cause as will promote the efficiency of the service and for reasons given in writing, and the person whose re-

> moval is sought shall have notice of the same and of any charges preferred against him and be furnished with a copy thereof, and also be allowed a reasonable time for personally answering the same in writing; and affidavits in support thereof; but no examination of witnesses nor any trial or hearing shall be required except in the discretion of the officer making the removal; and copies of charges, notice of hearing, answer, reasons for removal, and of the order of removal shall be made a part of the records of the proper department or office, as shall also the reasons for reduction in rank or compensation; and copies of the same shall be furnished to the person affected upon request, and the Commission also shall, upon request, be furnished copies of the same."

It will be noted from the foregoing rule that all that is required to effect the removal of an employee from the classified service is that he be given notice of the charges against him in writing and afforded a reasonable time to answer in writing. No examination of witnesses is required nor any trial or hearing except in the discretion of the officer making the removal.

Section 2 of Rule XII requires that in removals, reductions, and other disciplinary actions, like penalties be imposed for like offenses and that no discrimination be exercised for political or religious reasons. Section 9A of the Act of August 2, 1939, the so-called Hatch Act, however, provides as follows:

> "(1) It shall be unlawful for any person employed in any capacity by any agency of the Federal Government, whose compensation, or any part thereof, is paid

from funds authorized or appropriated by any act of Congress, to have membership in any political party or organization which advocates the overthrow of our constitutional form of government in the United States.

"(2) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any act of Congress for such position or office shall be used to pay the compensation of such person."

It will be noted from the foregoing statute that the removal of any person who is a member of a political party or organization which advocates the overthrow of our constitutional form of Government in the United States is mandatory. This ground for removal, therefore, constitutes an express statutory exception to the provision in Section 2 of Civil Service Rule XII prohibiting removals for political reasons.

The Civil Service Commission has implemented Section 9A of the Hatch Act by ruling that as a matter of official policy it will not certify to any department or agency the name of any person when it has been established that he is a member of the Communist Party, the German Bund, or any other Communist, Nazi, or Fascist organization. This ruling is parallel to subsection (e) of section 15 of H. R. Res. 544, making appropriations for work relief and relief for the fiscal year 1941, which was passed by the House of Representatives on May 23, 1940. This subsection reads as follows:

"No alien, no Communist, and no member of any Nazi Bund Organization shall

be given employment or continued in employment on any work project prosecuted under the appropriations contained in this joint resolution and no part of the money appropriated in this joint resolution shall be available to pay any person who has not made or who does not make affidavit as to United States citizenship and to the effect that he is not a Communist and not a member of any Nazi Bund Organization, such affidavit to be considered prima facie evidence of such citizenship, and that he is not a Communist, and not a member of any Nazi Bund Organization."

The attention of all departments is further invited to the fact that every employee of the Government who has taken an oath of office has sworn (or affirmed) that he will support and defend the Constitution of the United States against all enemies, foreign and domestic, and that he will bear true faith and allegiance to the same.

In view of the exigencies of the times, the Commission believes that Government agencies may freely take these matters into consideration in determining whether the removal of a particular employee will "promote the efficiency of the service" within the meaning of Section 1 of Civil Service Rule XII. Final decision in that respect in any event rests with the department or agency concerned, and the Commission is expressly prohibited by the civil service rules (Section 4, Civil Service Rule XII) from reviewing the findings of a removing officer or investigating any removal or reduction unless it is alleged with offer of proof that the *procedure* prescribed by Section 1 of Rule

XII has not been followed, or that the removal was made for political or religious reasons. As stated above, however, membership in a political party or organization which advocates the overthrow of our constitutional form of government constitutes a ground for mandatory removal and the Commission, therefore, will not investigate any removal which the department or agency reports was made pursuant to Section 9A of the Hatch Act.

Representatives of any agency who desire to secure more detailed information with respect to the separation of undesirable employees should contact Mr. James E. Hatcher, Associate Chief of the Commission's Investigation Division.

By direction of the Commission:

Very respectfully,

(signed) L. A. MOYER,

Executive Director and Chief Examiner.

UNITED STATES CIVIL SERVICE COMMISSION

Washington 25, D. C.

LRB:SWR:
jad

APRIL 17, 1950.

Memorandum No. 41, Revised
(Supersedes Memorandum No. 41 dated April 20, 1949.)

To All Executive Departments and Agencies:

Subject: Attendance of Witnesses at Hearings.

All reasonable efforts should be made to induce all identified non-confidential witnesses who have

given pertinent information adverse to the employee, to attend the hearing, testify in the employee's presence and subject themselves to cross-examination. All Loyalty Boards are instructed, in each case, to invite every witness who (1) is personally identified; (2) has given pertinent information adverse to the employee; and (3) has not expressly indicated his unwillingness to testify, to testify at the hearing. The invitation should be extended in a suitable manner, a reasonable time in advance of the hearing, if possible, so as to afford witnesses a reasonable opportunity to attend and should state the time and place where the hearing will be held and *that the Board cannot pay witness fees, or reimbursement for travel or other expense.* Notice by letter, duly posted, will be sufficient.

If any such witness declines or fails to appear as a witness after being thus invited by the Board, the Board shall take into consideration any reason or excuse existing for failure or refusal of such witness so to testify, in considering and evaluating the testimony of such witness as it appears in the FBI report, or elsewhere.

It is desired that each Board shall suitably certify in its ultimate reported determination, that the provisions of this directive have been duly complied with, and failure to so notify such witnesses, may, in the discretion of the Loyalty Review Board, be ground for a remand of such case for further proceedings in accord with this memorandum.

/s/ Seth W. Richardson,
SETH W. RICHARDSON,
Chairman, Loyalty Review Board.

U. S. GOVERNMENT PRINTING OFFICE: 1950

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OCT 11 1950
CLERK

IN THE

Supreme Court of the United States

October Term, 1950.

No. 49

DOROTHY BAILEY, *Petitioner,*

v.

SETH W. RICHARDSON, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

THURMAN ARNOLD,
ABE FORTAS,
PAUL A. PORTER,
MILTON V. FREEMAN,
Counsel for Petitioner.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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IN THE

Supreme Court of the United States

October Term, 1950.

No. 49

DOROTHY BAILEY, *Petitioner,*

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SETH W. RICHARDSON, et al., *Respondents.*

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

REPLY BRIEF FOR PETITIONER.

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1. The Government's brief in effect admits that the procedure in the Dorothy Bailey case is indefensible. By its silence on the point, the Government confesses that, as applied in the Bailey case, the elaborate hearing procedures set forth in the President's Loyalty Order are meaningless trappings; an empty gesture to the fundamental principles of our democracy, devoid of substance. Dorothy Bailey was heard. She was represented by counsel. Her testimony and the testimony of witnesses on her behalf were

faithfully transcribed. But the entire process was a hollow mockery. Neither Dorothy Bailey nor her lawyers—nor even her judges—knew the identity of her accusers. Dorothy Bailey and her lawyers were not informed of the details of the accusation.

Dorothy Bailey was not convicted of disloyalty to her government on the basis of a single line of evidence in the record. In fact, she was not convicted by her judges. She was convicted by nameless investigators who certified to her nominal judges that her nameless accusers were reliable.

This the Government does not, and cannot, dispute. It is the horrifying fact of this case. The Government attempts to meet it, first, by insisting that the procedure is technically valid; second, by insisting that the full responsibility for it is on the Executive Branch, and that the courts may not intervene; and third, by an attempt to justify this ultimate degradation of democratic procedure by an elaborate exposition of the Communist menace.

A major part of the Government's brief (pages 13 to 55) is devoted to this third point. The intransigent and dangerous policy of the Soviet Union is not in issue in this case. We agree that there is ample justification for the Government of the United States to take measures to protect itself against Communist infiltration in Government positions. We point out, however, that there is not a word of evidence in the record before this court connecting Dorothy Bailey with Communism, the Soviet Union, or the infiltration of the Government.

We agree, as the Government's brief so vividly portrays, that many influential groups in this nation have become more concerned about the elimination of Communists from the Government service and our national life than they are about the specific values of due process and individual rights. Despite the unusual tenor of the Government's brief, we are not persuaded that these values must or may

be destroyed in order to defend ourselves against a hostile power and an international revolutionary movement which also seek the destruction of individual rights.

We believe that the Bill of Rights was adopted because the people of this country anticipated that in times of crisis demands would inevitably be made to visit punishment upon citizens because of suspicion or panic. The Bill of Rights was designed to be brought into play in times of crisis—not discarded. In such times the Bill of Rights is designed to protect individual Americans against the tendency of the Executive Branch to yield to popular pressures. And the courts were chosen to implement that protection.

The government attempts to reassure the Court that individual rights are not in danger by showing in its brief that the members of the Loyalty Review Board who sat on Miss Bailey's case are prominent attorneys, most of whom have held high public office. The inference is that the judgment of such important persons in these delicate matters is an adequate substitute for a fair hearing. We would disagree even if these gentlemen had exercised their judgment on the reliability of the information on which Dorothy Bailey was found to be disloyal.[1] But the record is clear that they did not do so. They abdicated that function to the FBI. They accepted the FBI's evaluation of the reliability of the informants against Miss Bailey. They never saw the informants nor did they know who they were. The real decision in the case of Dorothy Bailey was made not by the members of the Board, but by some unknown agent of the Federal Bureau of Investigation.

2. *United States* v. *Lovett*, 328 U. S. 303, held that the permanent proscription of named individuals from govern-

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[1] "And anyway, as I have said before, personal confidence in the officials involved does not excuse a judge for sanctioning a procedure that is dangerously wrong in principle." Dissenting opinion of Justice Jackson, *U. S. ex rel. Knauff* v. *Shaughnessy*, 338 U. S. 537, 551.

ment employment on the ground that they were disloyal was a punishment of those individuals which could not be imposed without a trial. The government argues that the *Lovett* case has been limited or modified by *American Communications Association* v. *Douds*, 339 U. S. 382, because the *Douds* case permits the exclusion of Communists as a class from access to a government agency.

We may assume that Communists as a class can be excluded from the Government payroll without violating the Constitution. The *Lovett* case does not establish a contrary conclusion.

But the fact that Communists may be excluded does not mean that any individual who denies being a Communist can be declared ineligible without a hearing which meets the requirements of due process. The *Douds* case did not raise this issue. It does not affect the holding of the *Lovett* case in this regard. In the latter, it was the declaration of the ineligibility of specific individuals without a hearing which made the Congressional action invalid. It is the adjudication of disloyalty and the consequent declaration of ineligibility of Dorothy Bailey without evidence which makes the sentence against her invalid.

Dorothy Bailey has taken the non-Communist oath. (See e.g. R. 20, 22, 23, LB 3, 15-19). She has gone further and affirmatively proved by other evidence that she is not a Communist. The reasons of public policy which justify the President in excluding Communists from government employment do not and cannot under our Constitution remove the necessity of proving by appropriate evidence that Dorothy Bailey belongs to the excluded class. The *Douds* case does not imply that a labor official who took a non-Communist oath could nevertheless be denied access to the Board because the Board chose, without a hearing, to disbelieve him.

The *Douds* case in no sense overruled *Lovett*. The *Bailey* case is, we submit, governed by this Court's holding in *Lovett*. The proscription of an individual from government

employment is punishment which, when decreed by the Congress is a bill of attainder. When it is imposed by an administrative agency, it requires that due process be accorded to the individual.

3. The government argues that the President did not mean evidence when he said "evidence." It cites a small part of the lengthy report by the President's Temporary Commission on Employee Loyalty recommending that a program of hearings with respect to loyalty be set up and stating that a fair hearing may be had without confrontation. (Brief, pp. 105, 106) There is no reason to assume that the President accepted the recommendations of this Committee in all its details. His use of the word "evidence" and his expressed desire to afford "protection" to the employee indicates by all reasonable standards of construction a desire that employees should be condemned only on evidence.

Indeed, the government establishes (see n. 74, pp. 107-111 of Brief) that even the Loyalty Review Board believed confrontation was contemplated by the Order. Its decision not to require confrontation was based on assumed practical considerations and not on the intention of the President's Order. (See n. 74, pp. 107-111 of Brief). An examination of the Board's letter set forth in n. 74 establishes that the Review Board admitted that it was not carrying out the President's program "as planned" for the following reason: (see p. 109)

> "We were therefore faced with the decision whether to refuse at all times to disclose the Bureau report to the employee—save in the exceptional cases noted above—or to advise the Civil Service Commission that, in our opinion, the proposed loyalty program *as planned* should not be permitted to function." (Emphasis supplied)

4. The government argues that the dismissal for disloyalty is no different from dismissal for inefficiency or any other ground. Plainly, the Congress did not agree in this

respect. It recently made a clear distinction between dismissals on grounds related to the particular job and adjudications of disloyalty entailing ineligibility for governmental service. This was done in the legislation referred to in our main brief, page 31, permitting dismissal without evidence from sensitive agencies and authorizing the President to extend that power to new agencies as deemed necessary. P. L. 733, 81st Congress. The congressional determination that dismissals on grounds other than loyalty could be made in a summary manner was justified on the ground that the employee would not be ineligible for other government employment. See S. Rep. No. 2158, 81st Cong. 2d. Sess. quoted page 31 petitioner's original brief). This is a clear indication that the Congress realized that an adjudication of ineligibility on disloyalty grounds was different in kind and quality from a dismissal for such causes as inefficiency, unreliability or similar grounds related to a particular job.

5. The government also indicates that dismissals for loyalty involve considerations of a character which the courts are not equipped to try. (See pp. 77-78 of the brief.) Again, the government is expressing a position at variance with that expressed by the Congress. For most recently in the McCarran Act (Internal Security Act of 1950, P. L. 831, 81st Cong.), the Congress insisted that similar determinations, i.e., bearing on the Communist character of organizations, should be subject to complete judicial review, after open hearings under all the safeguards of the Administrative Procedure Act.

6. The government cites many cases designed to show that hiring and dismissal are executive functions and that erroneous exercise of admitted power cannot be corrected by the courts. This is true but the government concedes (p. 65), as it must, that where subordinate officials have not complied with applicable regulations laid down by executive order or by statute, a dismissal is illegal and the courts will reinstate the employee with back pay. *U. S.* v.

Wickersham, 201 U. S. 390; *U. S.* v. *Perkins*, 116 U. S. 483; *Borak* v. *Biddle*, 141 F. 2d 278 (App. D. C., 1944), cert. den. 323 U. S. 738; *Wittner* v. *United States*, 110 C. Cls. 231; *United States* v. *Elchibegoff*, 106 C. Cls. 541, cert. granted on petition of government November 12, 1946, 329 U. S. 704, writ dismissed on petition of government February 3, 1947, 329 U. S. 694. (The *Wickersham, Borak, Wittner* and *Elchibegoff* cases are cited on page 65 of the government's brief.)

And *United Public Workers* v. *Mitchell*, 330 U. S. 75, also cited by the government, is a recent holding that a federal employee has standing in court to protect his job against illegal, arbitrary or unconstitutional action by the government. Accordingly, Miss Bailey plainly has standing to complain to the courts that the decision against her violated the Executive Order and the Constitution.

7. The government argues that the Administrative Procedure Act exempts "from its coverage the selection or tenure of an officer or employee of the United States other than examiners." (Brief, p. 106) This is an inaccurate statement. The exemption is only from Section 5 of the Act (5 U. S. C. § 1004) and the effect of this exemption is merely to make it unnecessary to have an impartial hearing examiner and to follow the procedure specified before that examiner. Section 10 of the Act (5 U. S. C. § 1009) providing for judicial review of "agency action" contains no such exemption. The statute defines "agency action" as including "the whole or part of every agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act." 5 U. S. C. § 1001(g). Thus, although petitioner was not entitled to the hearing before an impartial examiner provided in Section 5 of the statute, she is entitled under Section 10 to review agency action under at least four of the standards set forth under Section 10(e). That section authorizes the courts to hold unlawful and set aside agency action "found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with

law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; . . ."

Respectfully submitted,

THURMAN ARNOLD,
ABE FORTAS,
PAUL A. PORTER,
MILTON V. FREEMAN,
Counsel for Petitioner.

October 11, 1950.

Office-Supreme Court,
FILED
SEP 20 1950
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 786 49

DOROTHY BAILEY, *Appellant*,

v.

SETH W. RICHARDSON, ET AL.

MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

RICHARD F. WATT,
Attorney for National Lawyers Guild.
1435 E. 60th Place,
Chicago, Illinois.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1950.

No. 766.

DOROTHY BAILEY, *Appellant*,

v.

SETH W. RICHARDSON, ET AL.

MOTION OF NATIONAL LAWYERS GUILD FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The National Lawyers Guild respectfully moves this Court, pursuant to Rule 27, paragraph 9, of the Rules of Court, for leave to file a brief as *amicus curiae*. Consent of the attorneys for the Appellant was requested but refused, making futile a request to the Solicitor General.

The interest of the National Lawyers Guild and its reasons for asking for leave to file a brief *amicus curiae* are set forth below.

The National Lawyers Guild is a nation-wide association of lawyers having as one of its primary objectives the pres-

ervation and strengthening of the basic rights and liberties guaranteed by the Constitution of the United States. In furtherance of this objective, its members and its committees and conventions endeavor to keep abreast of and to study and analyze significant developments and trends in the area of civil liberties and civil rights. On many occasions, where the issues raised in pending litigation seem of sufficient import, The National Lawyers Guild prepares and files briefs as *amicus curiae*. In so doing it attempts to bring to the attention of the courts, both state and federal, the viewpoint of a very considerable body of attorneys who believe that it is peculiarly the function and the privilige of lawyers to use their professional training to safeguard essential democratic processes.

This case is of obvious importance. Now for the first time, over three years since its promulgation, the constitutionality and mode of operation of the so-called "Loyalty Order", Executive Order 9835, are before this Court. The issues presented, while of overwhelming personal concern to the appellant, Miss Dorothy Bailey, are also of crucial significance to the vitality of certain constitutional guarantees as we have hitherto known them.

The National Lawyers Guild believes, that in a proceeding of such great moment, its views merit consideration. Specifically it seeks authorization to file a brief as *amicus curiae* devoted to the discussion of three propositions:

1. The loyalty board procedure involves the making of determinations directly affecting rights and interests of inestimable value. These rights and interests are no less than the ability and opportunity of an individual to earn a living and to live in an American community without being subjected to discrimination, threats, and obloquy. In the present state of the world and the resulting climate of opinion in this country, these basic rights are every bit as vital to the person concerned as liberty and property. The truth never quite catches up with false accusation or, for that matter, with hasty or ill-advised actions of a loyalty board. It is therefore essential that loyalty procedures

meet the standards of administrative due process established by this Court under the Fifth Amendment to the Constitution.

2. The provisions of Executive Order 9835 authorizing the Attorney General to designate certain organizations as "totalitarian, fascist, communist or subversive", which designations become part of one of the standards by which "loyalty" or "disloyalty" is determined by "loyalty boards", is contrary to the requirements of administrative due process. These provisions of Executive Order 9835 represent perhaps its most novel contribution to administrative procedure. The effect is obvious: A person may be found to be "disloyal" on the basis of membership in or association with an organization. But in the hearing leading to such a determination, the person has no opportunity to contest the designation of "subversive" placed upon the organization concerned. That designation has already been made, ex parte, by the Attorney General.

3. The restrictions on the rights of freedom of thought, freedom of speech, and freedom of assembly imposed by Executive Order 9835 drastically impair not only the rights of individuals as citizens but also the powers of those individuals as electors and governors. All too frequently the basic guarantees of the First Amendment are viewed only as part of a Bill of Rights. Yet an appreciation of the requirements of democratic government requires that these guarantees likewise be regarded as essential conditions for the very functioning of the government itself. Where those guarantees are infringed, democratic governmental functions are impaired, since the citizens, whose opinions, arguments, and meetings are all a vital part of the governing procedure itself, are prevented from thinking, speaking and assembling freely. To limit free speech is thus to gag not just citizens viewed as the possessors of rights but the very people who must be able to speak their minds in their role as voters and citizen-governors.

The National Lawyers Guild cannot be certain, of course, that these points will not be adequately discussed by counsel for appellant. It can only represent to the Court that it does not believe that these three points are fully presented or argued in appellant's Petition for Certiorari.

The National Lawyers Guild therefore urges that the propositions of constitutional law it seeks to discuss as *amicus curiae* be considered along with the arguments of appellant's counsel and the able opinion of Circuit Judge Edgerton, dissenting below. If this motion is granted, ten days would be required for the preparation, service and filing of the brief.

Respectfully submitted,

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Per Curiam Decisions.

No. 49. Bailey *v.* Richardson et al. Certiorari, 339 U. S. 977, to the United States Court of Appeals for the District of Columbia Circuit. Argued October 11–12, 1950. Decided April 30, 1951. *Per Curiam:* The judgment is affirmed by an equally divided Court. Mr. Justice Clark took no part in the consideration or decision of this case. *Thurman Arnold* and *Paul A. Porter* argued the cause for petitioner. With them on the brief were *Abe Fortas* and *Milton V. Freeman*. *Solicitor General Perlman* argued the cause for respondents. With him on the brief were *Assistant Attorney General Morison, James L. Morrisson* and *Samuel D. Slade*. Reported below: 86 U. S. App. D. C. 248, 182 F. 2d 46.